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No. 1167

IN THE

Supreme Court of the United States

October Term, 1968

ATHALIE IRVINE SMITH,

Petitioner,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue so that this Court may review the judgment entered on October 14, 1968, in this case by the United States Court of Appeals for the Ninth Circuit. Petition for Rehearing denied on December 18, 1968.

OPINIONS

The Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A., infra, pp. 40-44), is reported at 402 F.2d 772 (Ninth Circuit) 1968. The Opinion of the District Court (Appendix B., infra, pp. 48-111) is reported at 277 F.Supp. 774.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1968. Appendix A1, infra, p. 45. Petition for Rehearing denied on December 18, 1968. Appendix A2 and Appendix A3, infra, pp. 46-47. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Was it error for the Courts below to proceed to judgment in this action to invalidate an express inter vivos trust and to adjudge that the trust corpus, to wit, 510 shares (now 459 shares) of the stock of The Irvine Company were held by the trustee on a resulting trust for the heirs at law of the trustor, James Irvine, deceased, or his testamentary beneficiaries, who are also his heirs, in the absence of an indispensable party, to wit, James Myford Irvine, a minor, of the age of 13 years when this action was filed on August 10, 1966 and who is the grandson, heir, descendant and testamentary beneficiary of the trustor, James Irvine, deceased.

2. Was it error for the Court of Appeals to deny the appellant's Petition for Rehearing which petition included the contention by the appellant that the District Court should have appointed a guardian ad litem for the minor, James Myford Irvine and who should have been joined by the District Court as an indispensable party to this action, the same as Linda Irvine Gaede, the sister of James Myford Irvine, was joined as an indispensable party to this action because she is an heir, descendant, and testamentary beneficiary of her grandfather, James Irvine, deceased.

3. Did the signing of the Indenture of Trust involved in this action by Myford Irvine and E. M. Price, as the illusory and "dummy" President and "dummy" Secretary of The James Irvine Foundation, a corporation, who were placed in these corporate offices by James Irvine, the trustor, as his servants and in the performance of their duties as such servants and subject to his absolute control as their master, constitute a legal execution of the trust instrument.

4. Was the trust property, to wit, 510 shares of the stock of The Irvine Company (now 459 shares), legally delivered where the delivery was simulated by placing the custody of the Irvine stock with Myford Irvine or E. M. Price as the servants of James Irvine, the trustor, who solely controlled their duties and full time as such servants from the date of their respective employments, to wit, E. M. Price as stenographer and personal secretary from 1917 to the date of the death of James Irvine in August, 1947, and Myford Irvine as office clerk from 1920 to the time of the death of James Irvine.

5. By reason of the relationship of master and servant between James Irvine, the master, and Myford Irvine and E. M. Price, the servants, did James Irvine as trustor have the legal power as a matter of law to revoke this colorable delivery and to recall the Indenture of Trust and the trust property during his lifetime.

6. Because of the colorable delivery of the trust property to the servants of the trustor, James Irvine, and the control by the trustor over his servants as a matter of law and therefore the control and dominion by

the trustor over the trust property and the Indenture of Trust during his entire lifetime prevent the title to the trust property from being vested in the trustee during the lifetime of the trustor.

7. Was the trust an attempted testamentary disposition by the trustor, James Irvine, and void because it did not comply with the laws of California that require two subscribing witnesses to the valid execution of Wills.

8. Did the exercise of acts of ownership and dominion by the trustor, James Irvine, during his entire lifetime over the trust property negate the delivery of the trust property.

9. Did the absence of any acts of ownership or dominion by The James Irvine Foundation as trustee over the trust property during the entire lifetime of the trustor, James Irvine, establish the non-delivery of the trust property.

10. Was the trust a mere agency and not a true trust.

11. Was the trust illusory.

12. Because of the legal non-delivery of the Indenture of Trust and the trust property, did the title to the Irvine stock vest in the trustee during the lifetime of James Irvine.

13. Did the Indenture of Trust involved in this action create a wholly charitable trust or did the trust instrument contain both private and charitable purposes.

14. Did the trust violate the California Constitution, Article XX, Section 9, which prohibits trusts in perpetuity except for eleemosynary purposes.

15. Did the Indenture of Trust impose a mandatory duty on the trustee to devote the entire trust income fund wholly to charitable purposes and none other.

16. Was the trust illegal as contrary to public policy.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 19, Federal Rules of Civil Procedure for the United States District Courts, (Appendix C, infra, pp. 112-113).

STATEMENT

Petitioner herein who was the plaintiff below filed her original Complaint in the United States District Court for the Central District of California on August 10, 1966. The defendants named in the original Complaint were The James Irvine Foundation, a corporation, and the following individuals who were named as defendants because they were Members, Directors and Trustees of the defendant Foundation, to wit, N. Loyall McLaren, A. J. McFadden, James G. Scarborough, Robert H. Gerdes, Kate L. Wheeler, James H. Metzgar, Edward W. Carter, Mark R. Sullivan, John V. Newman, John A. Murdy, Jr., Morris M. Doyle, William Bradford Hellis. The Irvine Company, a corporation, organized under the laws of West Virginia was also named as a nominal defendant.

Jurisdiction of the District Court was invoked under 28 U.S.C., Section 1332 and is based upon diversity of citizenship. Petitioner and plaintiff below is a resident

of the State of Virginia. All of the respondents and defendants below for Federal Court jurisdictional purposes are citizens of the State of California.

The defendant Foundation, among other grounds, contended in its Motion for Summary Judgment or Dismissal that the plaintiff as an heir at law did not have the capacity to maintain her action; the plaintiff pursuant to Order of the District Court filed an Amended Complaint and alleged that she brought her action as an heir at law of James Irvine and/or as a beneficiary under the Last Will and Testament of James Irvine. Motion for Summary Judgment or Dismissal was denied by the District Court on February 22, 1967.

The Foundation, in its answer, alleged that the plaintiff had failed to name or join all the heirs at law of James Irvine and/or all of the beneficiaries of the Estate of James Irvine, and named as one of the absent parties, Linda Irvine Gaede, who is a granddaughter of James Irvine and whose father, Myford Irvine, died in 1959; she is also a testamentary beneficiary under the Will of James Irvine. The plaintiff alleged that the Court should join as a party defendant in this action all persons who are indispensable or necessary parties thereto on its own motion. Later in the proceeding, a motion was made by the Foundation and granted by the Court to join Linda Irvine Gaede as an indispensable party. Other parties were also joined as defendants at the request of the Foundation, but none of them were heirs at law or testamentary beneficiaries of James Irvine. James Myford Irvine, a minor, who is a grandson, heir and testamentary beneficiary of James Irvine, deceased, the same as his sister,

Linda Irvine Gaede, was not named or joined as an indispensable party and he therefore was and is an absent indispensable party to this action.

The Petition for Rehearing called to the attention of the Court of Appeals the fact that the minor James Myford Irvine is an absent indispensable party and therefore that the judgment of the Court of Appeals should be vacated, and the judgment of the District Court should be reversed and a new trial ordered. The Petition for Rehearing further disclosed that the said minor, James Myford Irvine, was and is subject to the jurisdiction of the District Court and the service of process.

There was introduced in evidence as Exhibit E-6, The Irvine Family Tree as follows:

THE IRVINE FAMILY TREE

James
(1827-86)

m. 1892 Frances Anita Plum m. 1931 Katharine (Big Kate)

James Jr. (J.I.)
(1867-1947)

n. 1892 Frances Anita Plum m. 1931 Katharine (Big Kate) Brown White

James III (Jase) (1893-1935)		Kathryn Helena (1894-1920)	Myford Plum (Mike) (1898-1959)	
m. 1914 Madeline Agassiz	m. 1929 Athalie Richardson	m. 1919 Frank Z. Lillard	m. 1922 Thelma Romey	m. 1950 Gloria W. White
	Athalie Anita (Joan) (1933–)	Kathryn (Katie) Lillard (1920–)	Linda Jane (1940–)	James Myford (1953–)

The action below is based upon the claim of the petitioner, plaintiff below, that the inter vivos Indenture of Trust which was signed by her grandfather, James Irvine, on February 24, 1937, as trustor, and signed by his employees and servants, Myford Irvine, his son and office clerk, and E. M. Price, his personal secretary, as his "dummy" President and his "dummy" Secretary of his personal business organization known as The James Irvine Foundation, a corporation, is invalid and void. The petitioner further contended that because the inter vivos trust is invalid and void that The James Irvine Foundation, as trustee, holds the trust property, to wit, 459 shares of the stock of The Irvine Company on a resulting trust for the petitioner and her cousins as the surviving heirs at law and/or testamentary beneficiaries of their grandfather, James Irvine.

The grounds upon which the Complaint is based are the same as the issues which are set forth in paragraphs 3 to 16, on pages 3, 4 and 5 of this Petition under the title "QUESTIONS PRESENTED". The District Court entered judgment against the plaintiff on December 18, 1967, and the Court of Appeals affirmed this judgment on October 14, 1968. Petition for Rehearing was denied on December 18, 1968. The Complaint in this action is based upon the decision of the Supreme Court of California in the case of *Davenport vs. Davenport Foundation*, 36 Cal.2d 67, 222 P.2d 11. In this case, the Court stated:

> "To the extent that the express trust may be found to have failed because of an invalid restraint on alienation, La Verne College and its successor

trustee, The Davenport Foundation, will have held the legal title to the property on a resulting trust for the trustor and his heirs. See *Bainbridge vs. Stoner*, 16 Cal.2d 423, 428; 106 P.2d 423. Defendants do not dispute the rules that ordinarily the trustee of a resulting trust is considered a voluntary trustee and that the Statute of Limitations does not begin to run in favor of a voluntary trustee until he repudiates the trust. See *Berniker vs. Berniker*, 30 Cal.2d 439, 447-448; 182 P.2d 557."

One of the issues involved in this case is that the Irvine trust is invalid because the trust indenture contains non-charitable provisions and purposes which constitute a restraint on alienation and violate the Statute of Perpetuities.

REASONS FOR GRANTING THE WRIT

JAMES MYFORD IRVINE, A MINOR, AS AN HEIR AT LAW AND TESTAMENTARY BENEFICIARY OF THE TRUSTOR, JAMES IRVINE, IS AN INDISPENSABLE PARTY.

The absence of an indispensable party to this action, to wit, the minor, James Myford Irvine, who is an heir, descendant, and beneficiary under the Will of his grandfather, James Irvine, deceased, is fatal to the judgments entered for the defendants and appellees by the courts below. The decision of the Court of Appeals that affirmed the judgment of the District Court conflicts with two recent decisions of the Supreme Court of the United States, to wit, *Provident Tradesmens Bank and Trust Company, etc. vs. Patterson*, 300 US 102, 19 L.Ed.2d

936, 88 S. Ct. 733, decided January 29, 1968, and the case of *Hanson vs. Denckla*, 357 US 253, 2 L.Ed.2d 1283, 78 S.Ct. 1228, decided June 23, 1958. The Supreme Court in the *Provident* case, supra, stated that the mandatory duty to protect the rights of an absent indispensable party which is imposed by the law on a Court of Appeals, such as James Myford Irvine as the minor heir, descendant and beneficiary under the Will of his grandfather, James Irvine, deceased, is as follows:

> "When necessary, however, a Court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." "8" pp. 945, 946.
>
> "8. E. G., Hoe v. Wilson, 9 Wall 501, L.Ed. 762. See generally 2 Barron and Holtzoff Federal Practice and Procedure, Section 516 (1967 Supp.) (Wright Ed.)."

It is therefore clear that both of the above authorities referred to by the Supreme Court in footnote "8" are approved by the Supreme Court and that they constitute the law that is applicable to this case. These authorities are set forth in the Appendix D, infra, pp. 114-115. There is also set forth in Appendix E, infra, at pp. 116-118 certain California authorities which are applicable to the status of James Myford Irvine as an heir at law and descendant of his grandfather, James Irvine, deceased.

If Myford Irvine, the father of Linda Irvine Gaede and James Myford Irvine, was alive when this action was

filed on August 10, 1966, he as the son and heir of James Irvine, deceased, would have been an indispensable party to this action because as such heir, he would have been entitled to receive a one-third share of the trust fund in the event this action was successful. But inasmuch as Myford Irvine was not alive, his share of the Irvine stock trust corpus belongs to his children, Linda Irvine Gaede and James Myford Irvine, but they do not inherit the Irvine stock from their father but directly from their grandfather.

The decision of the Court of Appeals in this case that forecloses the constitutional right (*Hanson v. Denckla*, supra) of James Myford Irvine to be joined as an indispensable party to this action is in conflict with the decisions of other Courts of Appeals as set forth in the Appendix F, infra, p. 119, and also the decision of the Court of Appeals is in conflict with the decision of the Supreme Court of California in the case of *O'Connor vs. Irvine*, et al., 16 Pac. Rptr. 236. The applicable portion of this decision is set forth in Appendix G infra, pp. 120-121.

THE DOCUMENTARY EVIDENCE ESTABLISHED THERE WAS NO LEGAL DELIVERY OF EITHER THE IRVINE STOCK OR THE INDENTURE OF TRUST DURING THE LIFETIME OF THE TRUSTOR. THE TRUST THEREFORE WAS AN ATTEMPTED TESTAMENTARY DISPOSITION BY THE TRUSTOR.

The testamentary provisions of the Indenture of Trust as well as the contemporaneous documentary exhibits

introduced during the trial established the contention of the petitioner that the trust constituted an attempted testamentary disposition by James Irvine, the trustor, of the property, to wit, 510 shares of the stock of The Irvine Company, now 459 shares. The decision of the Courts below on this issue of testamentary disposition as well as the issue of law which demands the irrevocable and absolute relinquishment by James Irvine, as trustor, of any control over the trust property during his lifetime and the other substantial issues involved in this diversity action are in conflict with the controlling decision of this Court in the case of *Basket v. Hassell*, 107 U.S. 602, decided March 26, 1883, and California Appellate Court decisions which constitute the law in California that is applicable to this diversity case. Portions of the decision of this Court in the case of *Basket v. Hassell*, supra, and in the California cases hereinafter listed are set forth in the Appendix H, infra, pp. 122-135.

Monell vs. College of Physicians and Surgeons (1962) 17 Cal.Rptr. 744, 198 Cal.App.2d 38; Hearing denied by the Supreme Court.

Lawson v. Lowengart, 50 Cal.Rptr. 186;

Obranovich v. Stiller, 34 Cal.Rptr. 923;

Lefrooth v. Prentice, 259 P. 947, 202 Cal. 215.

See also the following California authorities:

Booge v. Reinicke, 114 P.2d 427, 45 C.A.2d 60; *In re Estate of Walkerly*, 41 P. 772, 108 Cal. 627; *Campbell-Kawannanakoa v. Campbell*, 92 P. 184, 152 Cal. 201; *In re Whitney's Estate*, 167 P. 399, 176 Cal.

12; *In re Maltman's Estate*, 234 P. 898, 195 Cal. 643; *Estate of Van Wyck*, 196 P. 50, 185 Cal. 49; *In re Estate of Bailess*, 51 Cal.Rptr. 850; *Estate of Peabody*, 70 P.2d 249, 21 Cal.App.2d 690.

During the trial of this action before the District Court, which commenced as a deposition hearing under the judicial supervision of Judge Henry N. Graven, several exhibits were introduced. Insofar as the petitioner is concerned, her exhibits in the main constituted substantial documentary evidence which supported her contention that the alleged trust was an attempted testamentary disposition; that there was no legal delivery of the trust property, to wit, 510 shares of Irvine Company stock, or the Indenture of Trust; that the trustee never had any duties or powers or functions and held no title to the trust property during the life of the trustor James Irvine; that James Irvine, the trustor, subsequent to February 24, 1937, the date of the Indenture of Trust, until August 24, 1947, the date he died, either personally held the physical possession of the trust property, to wit, 510 shares of the stock of The Irvine Company, and also the Indenture of Trust, or that the trust property and the Indenture of Trust during all of this time were in the simulated custody or colorable possession of Myford Irvine and/or E. M. Price as the employees and servants of James Irvine, and that their custody and colorable possession thereof as such employees and servants as a matter of law constituted possession by their employer and master, James Irvine, as he had the absolute control and dominion over his employees and servants and they were, as a matter of law, required to obey his demand that the trust prop-

erty and Indenture of Trust be returned to him at any time and it matters not as a matter of law whether any such demand was ever made.

During the entire 30 year period that Myford Irvine and E. M. Price were the employees and servants of James Irvine, which covered his entire lifetime from 1917 until he died in 1947, they were the exclusive and full time employees and servants of James Irvine. Wheresoever they served, they represented their master, James Irvine, and were under his absolute control as a matter of law whether they acted for him as his "dummy" President and "dummy" Secretary of The James Irvine Foundation (which corporation was one of the personally controlled business organizations of James Irvine that was created by him for his sole personal business transactions), or in any other capacity, wherever or for whomever their services and duties as the employees and servants of James Irvine might be performed. For their services as such employees and servants of James Irvine and in every capacity and wheresoever they were assigned in the performance of their services, they received their entire compensation from James Irvine and received no compensation whatever from The James Irvine Foundation, or any other source. Their duties and the place where their services were rendered in all capacities including corporate offices held or titles bestowed were in the personal business offices of James Irvine and his personal owned or controlled organizations, Room 820, Crocker Building, San Francisco, California. James Irvine paid the rent. The James Irvine Foundation had no independent corporate or business offices or business during

the lifetime of James Irvine; the Foundation corporation had no employees, no telephone, no furniture, no stationery, no stamps, no petty cash, and no facilities of any kind to transact any business or any need for an office or place of business during the entire lifetime of James Irvine. Exhibits A-76, A-77. The Foundation was but the shadow of James Irvine.

James Irvine, in his Last Will and Testament executed on May 14, 1946, approximately one year before his death, made a gift in paragraph 9, Article Second of said Will to Edna M. Price, as follows:

> "To Edna M. Price, as a token of my appreciation of her long and faithful services as my secretary, the sum of Fifteen Thousand Dollars ($15,000.00)."

In this provision of his Will, James Irvine confirmed the contention of the petitioner that all of the services rendered by Edna M. Price to James Irvine and all of his organizations, corporations or co-partnerships from 1917 to the date of his death in 1947 represented a period of her long and faithful services as his exclusive and fulltime employee and servant and included the services rendered by her for James Irvine in holding the "dummy" office of Secretary in the organization of James Irvine known as The James Irvine Foundation, as well as her services that were connected with the custody or colorable possession of the 510 shares of Irvine stock and/or the Indenture of Trust.

After the death of James Irvine, E. M. Price was employed by the executors of the Will of James Irvine, deceased, as their "Secretary," at the same salary she

had received from James Irvine as his secretary during his lifetime. First Account of Executors, Appendix I, infra, pp. 136-139.

The offices of James Irvine at 820 Crocker Building, San Francisco, California, were retained by his executors as the offices of the Estate. Appendix I, infra, pp. 136-139. In her capacity as "Secretary" to the executors, E. M. Price continued to hold the custody and possession of the Irvine stock certificates. Exhibit D-2, Appendix J, infra, pp. 140-141, is a letter written by E. M. Price on November 7, 1947, approximately two months after the death of James Irvine. This letter was written to Bradford M. Hellis, Secretary of The Irvine Company at Tustin, Orange County, California. It was written on stationery that carried the following identification: "Estate of James Irvine, Crocker Building, San Francisco 4, California." This letter was signed by E. M. Price as "Secretary" to the executors and enclosed with the letter were the certificates for 510 shares of stock of The Irvine Company which stood in the name of "James Irvine." After the death of James Irvine, the Irvine stock certificates had come into the possession of the executors as an asset of the Estate of James Irvine, deceased. In her letter, E. M. Price as such "Secretary" to the executors instructed Mr. Hellis as the Secretary of The Irvine Company to transfer the enclosed certificates for 510 shares of Irvine Company stock from the name of "James Irvine" to The James Irvine Foundation.

The finding of the District Court that Edna M. Price, either signed her letter or sent in for a transfer to the Foundation, the certificates for 510 shares of Irvine stock

as "the Secretary and Treasurer of The James Irvine Foundation" is totally without support in the record and is without a scintilla of evidence to support the same and is "clearly erroneous". With reference to this finding and other "clearly erroneous" findings of the District Court, the Court of Appeals in its two and one-half page per curiam decision made the following statement:

> "To the contrary, we are not in the slightest convinced that the District Court's findings are erroneous — clearly or otherwise; consequently, those findings will not be disturbed."

The other findings of the District Court that were designated in the briefs for petitioner that were filed with the Court of Appeals as "clearly erroneous" are also not supported by the record and the substantial evidence and the same like the above-mentioned finding of the District Court are likewise "clearly erroneous."

Had the Irvine stock been legally delivered to the James Irvine Foundation and the title thereto vested in the Foundation as trustee during the lifetime of James Irvine, the Foundation, as trustee, would have had the legal possession of the certificates of Irvine stock and not the executors of the Irvine Estate after James Irvine died. Had the certificates of Irvine stock been in the actual physical possession of the Foundation before the death of James Irvine, the certificates would have been transmitted immediately after the death of James Irvine and directly by the Foundation through its attorney, James G. Scarborough, to The Irvine Company, together with a copy of the Indenture of Trust and the certificates and the trust

instrument would have constituted all the authority that was necessary for The Irvine Company to transfer the certificates of stock on the records of The Irvine Company that stood in the name of James Irvine to the name of The James Irvine Foundation. But as the Irvine estate executors had come into the possession of the Irvine stock as an asset of the Estate of James Irvine, deceased, it became necessary under the probate laws of the State of California and the Revenue and Taxation Code of California for the executors through their attorney, Chaffee E. Hall, to obtain the consent of the California Controller for the transfer of the Irvine stock. No such consent would have been necessary had the Irvine stock been legally delivered to the trustee during the lifetime of James Irvine, and the title thereto had vested in the trustee. Attorney Hall who obtained the consent to transfer the Irvine stock from the California Controller was the attorney for the executors and he was not the attorney for The James Irvine Foundation, whose attorney, as hereinabove mentioned, was James G. Scarborough. Appendix K, infra, pp. 142-143.

The executors of the Will of James Irvine, deceased, acted illegally in delivering the 510 shares of Irvine stock to the Foundation after the death of James Irvine. The Irvine stock was an intestate asset of the Estate of James Irvine, deceased, and the executors should have required the Foundation to institute an action against the executors and judgment in the action should have been entered in favor of the Foundation before the Irvine stock was ever delivered by the executors to the Foundation. Neither the executors or the probate court had any jurisdiction or

authority to cause the Irvine stock to be delivered to the Foundation in the absence of a judgment of the Superior Court of the State of California, for the City and County of San Francisco. No such action was ever filed or required to be filed for the reason that each of the executors stood in an adverse and conflict of interest position to the estate of James Irvine, deceased, because of their superior connection with The James Irvine Foundation, as members, directors and trustees of the Foundation corporation. The law in California which is applicable to the illegality of the acts and conduct of the executors is stated in the California Supreme Court case of *Auslen v. The Superior Court of the City and County of San Francisco*, 377 P.2d 72, 28 Cal.Rptr. 8, as follows:

> "Probate proceedings being statutory in nature, the Superior Court sitting in probate has no other powers than those given by statute and such incidental powers as pertain to it and enable the court to exercise the jurisdiction conferred upon it." (*Estate of Schloss*, 56 Cal.2d 248, 253; 14 Cal. Rptr. 643, 363 P.2d 875).
>
> "The Superior Court sitting in probate has no authority to exercise jurisdiction over inter vivos trusts (Cf. More v. More, 133 Cal. 480, 489, 494, et seq., 65 P. 1044, 65 P. 76).
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> * * * * * * *
>
> "Where one person seeks to establish the amount of his share in a particular trust fund, other persons with similar interests are indispensable parties." (James Myford Irvine)

ACTS OF OWNERSHIP AND CONTROL BY JAMES IRVINE OVER THE IRVINE STOCK DURING HIS LIFETIME.

Notices of meetings of directors and members of The Irvine Foundation were sent out from the personal offices of James Irvine and on the personal letterhead stationery of James Irvine during his lifetime and the Estate of James Irvine, deceased, subsequent to his demise. These notices indicated the meetings would be held in the offices of James Irvine, or the Estate of James Irvine, at 820 Crocker Building. Exhibit A-14, Appendix L, infra, pp. 144-150.

On April 21, 1941, a period of four years after the Indenture of Trust was signed by James Irvine, as trustor, on February 24, 1937, James Irvine still retained the physical possession of the Irvine stock certificates described in the Indenture of Trust as Certificates Nos. 33 and 42 representing 173 shares of the stock of The Irvine Company. These two certificates of Irvine stock together with a third certificate, No. 23, for 332 shares also in his possession, represented the 505 shares of the stock of The Irvine Company, now 549 shares, which are involved in this case. Mr. Irvine attended a meeting of the Board of Directors of The Irvine Company in The Irvine Company's offices in Orange County, California, on April 26, 1941, Appendix M, infra, pp. 151-152. He also was present in the Offices of The Irvine Company in Orange County, California, on April 21, 1941, at which time he personally surrendered Certificates Nos. 33 and 42 for 173 shares of Irvine stock with instructions to cancel the certificates and to re-issue to him and in his name, to

wit, James Irvine, new Irvine stock certificates Nos. 45, 46, 47, and 48 for 10 shares each of Irvine Company stock, certificates 49 and 50 for 5 shares each of Irvine Company stock and certificate No. 51 for 132 shares of Irvine Company stock, a total of 173 shares of new stock certificates in The Irvine Company. Each of these new stock certificates were signed personally by James Irvine as President and William Bradford Hellis, as Secretary of The Irvine Company in the office of The Irvine Company in Orange County, California, on April 21, 1941, and were thereupon delivered to James Irvine in lieu of Certificates 42 and 43 of The Irvine Company which he had surrendered for cancellation. The stockholders certificate records of The Irvine Company show both the surrender of Certificates 33 and 42 over the signature of James Irvine and the reissuance to James Irvine of the new Certificate Nos. 45, 46, 47, 48, 49, 50 and 51. Exhibit No. 11, Appendix N, infra, pp. 153-163.

Notwithstanding the documentary evidence hereinabove mentioned and disclosed in Exhibit No. 11, Appendix B, infra, pp. 48, 88, the District Court made the following finding which is "clearly erroneous":

> "In connection with the surrender of the certificates of stock and the issuance of new certificates of stock referred to by the plaintiff, the defendants assert, and correctly so, that the record is silent as to facts and circumstances which surrounded the surrender of the new certificates". * * *

Exhibit No. 3 consists of copies of Federal and California Income Tax Returns of The Irvine Company during the period 1936 through 1947. Schedules contained

in both of these income tax returns for each year during this 11 year period disclosed that James Irvine was President of The Irvine Company and that he was the owner of 547 shares of Irvine Company stock. The 547 shares included the 510 shares of Irvine stock now 459 shares that are involved in this action.

Both the Federal and California Income Tax returns during each year of the 11 year period contained a balance sheet showing the financial condition, including the assets and liabilities of The Irvine Company. At the foot of each of these balance sheets during the 11 year period, the following typewritten statement appeared:

> "Ownership of company stock. James Irvine owns 547 shares out of a total of 1000 shares outstanding. This stock was acquired in 1894 and his return is filed in San Francisco where he resides."

Exhibit No. 2 consists of copies of the minutes of the stockholders and directors meetings of The Irvine Company during the period 1937 through 1947. During this period, James Irvine was the President of The Irvine Company which was under his sole dominion and control and at the annual and special meetings of the stockholders during the 10 year period, the minutes reported that James Irvine was the owner of 547 shares of stock of The Irvine Company. When James Irvine did not personally attend the stockholders meetings, the 547 shares of his Irvine Company stock were voted under a written proxy signed by James Irvine, which stated that James Irvine was the owner and held 547 shares of The Irvine Company stock.

All of the directors of The Irvine Company from the date of its incorporation in 1894 and until James Irvine died on August 24, 1947, were the appointees of James Irvine and accounted solely to him as such controlled director. All of these directors were employees of James Irvine or his alter ego, The Irvine Company. None of them were employees, agents or representatives of The James Irvine Foundation during the lifetime of James Irvine.

ABSENCE OF ANY ACTS OF OWNERSHIP OR CONTROL BY THE IRVINE FOUNDATION OF THE IRVINE STOCK DURING THE LIFETIME OF JAMES IRVINE.

During the year 1939, The Irvine Foundation, as a corporation, but not as trustee under the 1937 Indenture of Trust, applied to the United States Treasury Department as a charitable corporation for exemption from Federal Income Tax. On November 9, 1939, the United States Treasury Department wrote a letter to The James Irvine Foundation which acknowledged the receipt of its application. Appendix O, infra, pp. 164-166. Nothing was stated in the letter of the Treasury Department that indicated the Irvine Foundation, a corporation, had claimed in its application that it held as trustee any shares of Irvine Company stock. Neither did the Treasury Department letter state that the application disclosed that James Irvine had contributed in trust or otherwise or at all any shares of Irvine stock to The James Irvine Foundation as trustee under an Indenture of Trust dated February 24, 1937. The Treasury Department letter

expressly stated that the income tax exemption to the Foundation was granted upon the condition that Returns for 1939 and subsequent years would not be required, "so long as there is no change in your organization, your purposes or your method of operation" and "any changes in your form of organization or method of operation should be immediately reported to the Commissioner of Internal Revenue for your district in order that the effect of such changes upon your exempt status may be determined". Notwithstanding this mandatory direction by the Treasury Department, the Irvine Foundation at no time during the lifetime of James Irvine, notified the Treasury Department that its status as a tax exempt charitable corporation also was as trustee under the 1937 Indenture of Trust or that 505 shares of Irvine stock had been contributed by James Irvine, to it as trustee, or that the Indenture of Trust had been delivered to the Foundation as trustee. It was admitted during the trial that a copy of the Indenture of Trust had not been filed with the Treasury Department during the lifetime of James Irvine. Rptr. Tr. 2878.

Copies of the income tax returns of The James Irvine Foundation, a corporation, during the period from 1939 through 1947 were introduced in evidence as Exhibit 21. Not one of these income tax returns during this period disclosed that The Irvine Foundation held or owned, as trustee, or otherwise or at all any stock in The Irvine Company.

The only evidence that was introduced by the Foundation concerning the alleged delivery to it of the Irvine stock was through the oral testimony of the defend-

ants, N. Loyall McLaren and Robert H. Gerdes, both of whom at the time of the death of James Irvine on August 24, 1947, and when they appeared at the trial as witnesses, were members, directors, and trustees of The James Irvine Foundation. At the time of the trial, Mr. McLaren was the President of the Foundation. Both of these witnesses testified that James Irvine had told them that the Irvine stock had been delivered to Myford Irvine and Edna M. Price. There was no evidence, including any conversation with James Irvine to the effect that the Indenture of Trust was ever delivered to either Myford Irvine or Edna M. Price or anybody else during the lifetime of James Irvine. There was no evidence that during the lifetime of James Irvine, the Foundation ever publicly disclosed that it held any title or interest either as trustee or otherwise in any stock of The Irvine Company. It was not until after the death of James Irvine that The James Irvine Foundation disclosed through the issuance of a press release, that upon the death of James Irvine, it became the owner of 510 shares of Irvine stock. The record is destitute of any evidence that it ever asserted any claim to any Irvine shares of stock until after the death of James Irvine. Under these circumstances, the applicable law in California is stated in the case of *Blonde v. Jenkins Estate*, 23 P.2d 14, 130 Cal.App. 417. Hearing denied by Supreme Court. Appendix P, infra, pp. 167-168.

Exhibit A-15 was introduced in evidence by The James Irvine Foundation. This Exhibit is a letter dated May 25, 1935, from Mr. Spaulding, attorney, to James Irvine, his client. In this letter, Mr. Spaulding advised Mr. Irvine as

follows: "Mr. McLaren, the other day suggested that the Indenture of Trust give more duties to the trustee. The fact is, however, that with a depositary and in view of the limited purposes of the trust during your lifetime, the trustee will in fact have little to do".

Exhibit A-1 is the 1937 Indenture of Trust that is involved in this action. The provisions of this trust instrument disclosed without conflict that no powers or duties or functions were vested in the Irvine Foundation as trustee during the lifetime of James Irvine and that no title to the Irvine stock was vested in the trustee until after the death of James Irvine. Appendix Q, infra, pp. 169-178.

The attention of the court is particularly called to the contention of the Foundation that the assignment clause which is set forth in the beginning paragraph of this trust instrument unequivocally constitutes a transfer in praesenti of the trust property. However, the petitioner contends that this assignment clause is restricted, limited and qualified by later provisions in the trust instrument so that the trust was not created or executed and did not become operative or constitute a transfer of the trust property in praesenti or vest any title to the trust property in the Foundation as trustee until after the death of James Irvine.

The Court will note that the powers of the trustee which begin at the top of page 4 of the Indenture of Trust provide:

"*After the death of the trustor*, all rents, interest, dividends and other income and profits of the trust property shall be collected and received by the trustee and shall be used, applied and devoted as follows."

The next 3 paragraphs which are numbered 1, 2, and 3 and which appear on pages 4, 5 and 6 of the trust instrument define the powers and duties of the trustee with reference to the disbursement of the income *after the death of the trustor.*

At the top of page 5 of the trust instrument, the following paragraphs provide: "To carry out the express purpose of this trust and in aid of its execution and the proper administration, mangement and application of the trust property, *the trustee is vested, after the death of the trustor,* with the following additional powers and discretions":

(After the death of the trustor.)

"1. To have, respecting the shares of stock hereinabove described (505 shares of Irvine Company stock) * * * *all the rights, powers and privileges of an owner* * * *. (Emphasis added).

It is therefore without conflict that there were no trustee powers described in the Indenture of Trust or any title to The Irvine Company stock which vested in the trustee until after the death of the trustor. The provision that "after the death of the trustor" the trustee would be vested "with the following additional powers and discretions", refers back to the first paragraph on page 4 of the Inden-

ture of Trust which is hereinabove set forth and which is appliicable to paragraphs 1, 2 and 3, pages 4 and 5 of the Identure of Trust as to the powers stated therein and which are to become operative only after the death of the trustor. This contention is further fortified by the provision contained in paragraph 5 on page 7 of the Indenture of Trust that further states that in addition to the post-mortem powers and discretions of the trustee that are enumerated in the foregoing provisions of the Indenture of Trust that the trustee and the Board of Directors thereof, in addition thereto *were further vested with and shall have after the death of the trustor, and for the full duration of the trust thereafter*, as to the trust property, the income therefrom, and in the execution of the trust the same powers and discretions that an absolute owner has or may have but subject to all of the post-mortem provisions and conditions of the said trust.

In a letter from James G. Scarborough, also an attorney for James Irvine and the Irvine Foundation, to Mr. Spaulding, dated June 19, 1936, Mr. Scarborough stated in substance that the certificates of Irvine stock would remain in the name of James Irvine but that they should be endorsed by Mr. Irvine and delivered to Miss Price, who at that time was the personal secretary to James Irvine and therefore would also act for James Irvine as Secretary of the Foundation, and that Miss Price would keep the certificates of Irvine stock in the safe in Mr. Irvine's office. Exhibit A-17.

Exhibits A-76 and A-77 are books of account of The James Irvine Foundation, a corporation, which were kept

by Edna M. Price as the secretary, employee and servant of James Irvine, who also paid her entire salary during the period 1937 through 1947. There is not a single entry in the books of account or in the minutes of the directors meetings of the Foundation (Exhibit A-14) which disclosed that any business was ever transacted by the Foundation, as trustee, during the lifetime of James Irvine.

The first account of the executors of the Will of James Irvine, deceased, disclosed that E. M. Price following the death of James Irvine was employed by the executors at the same salary she had received from James Irvine during his lifetime. This first account further disclosed that on November 7, 1947, the same date that E. M. Price as "Secretary" to the executors mailed the 510 shares of Irvine stock to Mr. Hellis, Secretary of The Irvine Company, for transfer to the Foundation, that the executors purchased with the funds of the Estate of James Irvine, deceased, $25.50 of revenue stock certificate transfer stamps that were enclosed in the letter of E. M. Price. This use of estate funds by the executors constitutes irrefutable evidence that on November 7, 1947, the 510 shares of Irvine stock were assets of the Estate of James Irvine, deceased.

On December 5, 1961, when N. Loyall McLaren was President of The James Irvine Foundation, he issued a press release which stated as follows:

> "The James Irvine Foundation holds controlling interest in the Irvine Company. Upon the death of

> James Irvine *on August 24, 1947, the Foundation became the owner of fifty one percent of the stock of The Irvine Company*, the principal asset of which is The Irvine Ranch located in Orange County, California. * * * (Emphasis Added)

On February 2, 1965, N. Loyall McLaren, as President of The James Irvine Foundation, established the contention of petitioner that James Irvine never delivered the Irvine stock or the Indenture of Trust to The Irvine Foundation, as trustee, and that no title to or any right, power, privilege or interest in the Irvine stock was vested in The Irvine Foundation as trustee until after the death of James Irvine, by writing a letter to Honorable Wilbur D. Mills, Chairman, Committee on Ways and Means, House of Representatives of the United States Congress as follows:

> *"From 1947 when the Foundation's rights in the stock (Irvine) vested* until March 31, 1965, The Irvine Company paid to its sharehloders in the form of dividends 89.1% of its operating income." (James Irvine died on August 24, 1947).
>
> *"Since this Foundation has owned more than 50% of The Irvine Company stock since 1947*, it is appropriate to evaluate the compulsory divestiture proposal in the terms of the results that reasonably may be expected from its application to this corporation." (Exhibit A-78). (Emphasis Added).

The foregoing documentary evidence authored by N. Loyall McLaren as President of The Irvine Foundation conclusively established that neither the delivery of the

Irvine stock or the Indenture of Trust or the transfer and vesting of the title to the Irvine stock occurred until after the death of James Irvine.

When the above quoted statements were issued, Mr. McLaren was the President of The James Irvine Foundation and Chairman of the Board of Directors of The Irvine Company and he had no reason to color the true facts concerning the time when The James Irvine Foundation as trustee became vested with the title to the Irvine stock, as not until after the death of James Irvine on August 24, 1947. Both of the above statements were issued prior to August 10, 1966, when this action was filed. There is no ambiguity in either statement of Mr. McLaren concerning the fact as admitted by Mr. McLaren that no title to the Irvine stock ever vested in The James Irvine Foundation, as trustee, during the lifetime of James Irvine. This crucial evidence emanating from the President of The James Irvine Foundation and the architect of the Indenture of Trust as the confidential tax adviser for Mr. Irvine can leave no question whatever but that the trust is void as an attempted testamentary disposition of the Irvine stock to the Irvine Foundation as trustee by James Irvine.

Exhibits A-64 and A-65 and A-66 are copies of records of the Crocker First National Bank of San Francisco. These exhibits disclosed that in January, 1929, E. M. Price and Myford Irvine, as the employees and servants of James Irvine were appointed by him as his agents and deputies to have access to his safe deposit box No. 4416. Appendix R, infra, pp. 179-184.

This agency authority to enter said safe deposit box No. 4416 at any time by either E. M. Price or Myford Irvine as employees and servants of James Irvine remained in full force and effect until the death of James Irvine on August 24, 1947. Safe deposit box No. 4416 contained millions of dollars of negotiable stocks and bonds which belonged to James Irvine as shown by the Federal Estate Tax Return which was filed by the executors of the Estate of James Irvine, deceased. (Exhibit B-15). James Irvine, during his lifetime, placed the custody and the colorable delivery of the 510 shares of Irvine stock in the hands of his employees Myford Irvine and E. M. Price under the same circumstances that he placed the millions of dollars of the stocks and bonds contained in his safe deposit box No. 4416 in their custody and possession by giving them, as his employees and deputies, the right of access thereto. The delivery of the Irvine stock and/or the Indenture of Trust to Myford Irvine and E. M. Price as the employees and servants of James Irvine, also had the same status in law as their agency and vicarious custody and possession of the contents of safe deposit box No. 4416. In both cases, Myford Irvine and E. M. Price acted as the servants and employees of James Irvine and were under his absolute dominion and control and in neither case did Mr. Irvine as their employer and master ever relinquish his possession of or his control over the title to the negotiable securities that were contained in the safe deposit box No. 4416 or the Irvine stock which was delivered to his employees Myford Irvine and/or E. M. Price and placed by them in the safe in Mr. Irvine's office or in any other depository.

In both cases, the relationship of Myford Irvine and E. M. Price to James Irvine was as his deputies and agents and over whom he at all times had absolute dominion and control.

THE INDENTURE OF TRUST CONTAINED BOTH CHARITABLE AND NON-CHARITABLE PURPOSES AND PERMITTED THE DEVOTION OF ALL OR A PART OF THE TRUST INCOME FOR PRIVATE USES.

In the Courts below, the petitioner contended that certain provisions of the Indenture of Trust deprived it of the status of a trust for wholly charitable uses and purposes and that the trust is therefore invalid under the rule against perpetuities. Article XX, Section 9 of the Constitution of California provides:

> "No perpetuities shall be allowed except for eleemosynary purposes".

Paragraph 2, pages 4 and 5 of the Indenture of Trust Appendix Q, infra, pp. 169-178 provides as follows:

> "Out of the balance of said income, after the deductions hereinabove provided, *the trustee may, and in the judgment of the trustor should, each year set aside such sum as the Board of Directors of the trustee shall in its sound discretion deem wise and expedient for investment, and said trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investments, when made, shall become a part of the corpus or principal of the trust property*, and the

income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided." (Includes reinvestments for other private uses). Emphasis added.

Under paragraphs 3 and 4, the trustee is empowered to make investments in any property or security which the trustee shall deem proper and advisable, whether or not permissible by law as investment for trust funds, and paragraph 4 further provides that all discretions in the trust conferred upon the trustee shall, unless specifically limited, be absolute and uncontrolled, and their exercise by the Board of Directors of the trustee conclusive on all persons interested in this trust.

It is therefore clear from the above mentioned provisions of the Indenture of Trust that it is possible that the trustee may, in its uncontrolled discretion, devote the whole or a part of the income received from the trust property (the Irvine stock) to private use through the investment of the income in a private school, that may be selected by the trustee. Under these provisions, therefore, the trustee has the power to use the trust income or a part thereof for a non-charitable purpose through the private use investment that is made from the trust income in a private school or some other private institution which thereupon becomes frozen into the corpus of the trust and inasmuch as the trust is solely an income trust, such converted income into corpus will never be available for charitable purposes.

In the case of *Estate of Peabody*, 70 P.2d 294, 21 Cal. App.2d 690, the California District Court of Appeal in

quoting from the case of *In re Shattucks Will*, 193 N.Y. 446, 86 N.E. 455, stated:

> "*The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift and requires that the same be held invalid.*" (Emphasis added).

The decisions of the Courts below are in conflict with the law of California which is applicable to this diversity action as hereinabove quoted from in the *Estate of Peabody* and also with the following California decisions, to wit:

In re Sutro's Estate (Supreme Court of California) 102 P.920, 155 Cal. 727;

In re Vance's Estate (District Court of Appeal) 4 P.2d 977, 118 Cal.App. 163;

In re Kline's Estate (District Court of Appeal) 32 P.2d 677, 138 Cal.App. 514, hearing denied by Supreme Court.

IMPORTANCE OF ISSUES INVOLVED IN THE CASE WHICH SUPPORT THE GRANTING BY THIS COURT OF THE WRIT OF CERTIORARI.

The issues involved in this case have tremendous importance not only to the petitioner and the other heirs of James Irvine, deceased, but also to all future litigants similarly situated and who will be confronted with the decisions of the Courts below. The findings of the District Court are based upon alleged fact matters which are not supported by the record or which involve oral testimony and completely disregard the superior documentary evidence to the contrary. In this respect, the decision of the Court of Appeals is in conflict with the decision of the United States Supreme Court in the case of *United States vs. United States Gypsum Company*, 92 L.Ed. 746, 766, where the Court said:

> "The government relied very largely on documentary exhibits and called as witnesses many of the authors of the documents. Both on direct and cross-examination, counsel were permitted to phrase their questions in extremely leading form so that the import of the witnesses testimony was conflicting. On cross-examination most of the witnesses denied they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents, *we can give it little weight, particularly when the crucial issues involved mixed questions of law and fact.* Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot, under the

circumstances of the case rule otherwise than that Finding 118 is clearly erroneous." Emphasis added.

The intrinsic financial importance of this case to petitioner and the other heirs of James Irvine, deceased, can best be judged by the enormous amount of money that is involved in the outcome of this case and which is best illustrated by the following statement that is contained in the Memorandum and Findings of the District Court:

> "The stock involved (459 shares) constitutes the majority of the stock of The Irvine Company. That corporation has large assets. Its largest asset is a tract of land known as The Irvine Ranch. That ranch consists of approximately 88,000 acres of land in Orange County, California. It is in the metropolitan area of Los Angeles. Estimates of the present value of the ranch range from One-half Billion Dollars to a Billion and One-half Dollars."

There are 841½ shares of stock of The Irvine Company outstanding. The petitioner is the owner of 180 shares thereof. The 459 shares involved in this action, based upon the estimated value of The Irvine Ranch as stated by the District Court represents a minimum value of approximately $250,000,000.00 and a maximum value of approximately $750,000,000.00. Should the petitioner prevail in this action, she would be entitled to receive from the intestate estate of James Irvine, deceased, 153 shares of the 459 Foundation shares, and the other heirs would receive 306 shares.

Petitioner also believes there is substantial public interest connected with the consideration of this case by this Court. The United States Government, through the illegal

action of the executors of the Will of James Irvine, deceased, in delivering the 510 shares (now 459) of Irvine stock to The James Irvine Foundation without requiring the Foundation to institute an action against the executors and to obtain a judgment to establish its title to the Irvine stock deprived the government of large estate taxes from the estate of James Irvine, deceased. Furthermore, the United States Government is an interested party in the outcome of this case for the reason that if the Irvine trust is held to be invalid, the government will receive in the future the income taxes from dividends which will be paid on the Foundation's 459 shares of Irvine stock which will thereupon be owned by the income tax paying heirs or testamentary beneficiaries of James Irvine, deceased. So long as the 459 shares of Irvine stock are held by the Foundation, as trustee (in perpetuity and forever), no income taxes will be paid on the dividends received by the Foundation. The current annual dividends received by the Foundation are in excess of One Million Dollars per year.

The issue that involves the absent indispensable party to this action, to wit, James Myford Irvine, likewise is a matter of substantial public interest. In this case, the relationship of James Myford Irvine as a lineal descendant and therefore an heir, as well as a testamentary beneficiary, of his grandfather, James Irvine cannot be disputed. Nevertheless. this minor heir and descendant has been foreclosed without due process of law from having his day in Court (*Hanson v. Denckla*, supra) by the decisions and judgments of both of the Courts below. These decisions and judgments therefore should not be permitted to stand not only because of this case, but for all the other

cases in the future which concern the right of an indispensable party to an action to receive due process and to have his day in Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LYNDOL L. YOUNG
Counsel for Petitioner

March, 1969

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,
Appellant,
vs.
THE JAMES IRVINE FOUNDATION, a corporation, et al.,
Appellees.

No. 22,607

[October 14, 1968]

On Appeal from the United States District Court
Central District of California

Before: PICKETT*, STALEY*, and JONES*, Circuit Judges.

PER CURIAM:

This is an appeal from the judgment of the United States District Court for the Central District of California. Plaintiff-appellant, Athalie Irvine Smith, is a citizen of the State of Virginia while, for the purposes of Federal jurisdiction, all defendants-appellees are citizens of the State of California. Jurisdiction in the district court was thus invoked under 28 U.S.C. § 1332 and was based on diversity of citizenship. It is undisputed that the law of California applies.

The district court, in its learned and exhaustive memorandum opinion, Smith v. The James Irvine Foundation,

*Sitting in the Ninth Circuit by designation.

277 F.Supp. 774 (C.D. Calif. 1967), quite ably collated and detailed the material facts of this case. That effort need not be duplicated here. Our task on this appeal is basically that of determining whether the district court erred in holding that the trust indenture executed by James Irvine on February 24, 1937, established a valid trust for charitable purposes; that a charitable foundation, The James Irvine Foundation, had valid title to the disputed shares of stock passing under the trust indenture; and that neither the heirs at law of James Irvine nor the beneficiaries under this will had any right, title or interest in the contested shares.

Appellant argues that the district court did err in its analysis and disposition of the legal issues, and she challenges some forty-one findings of fact as being clearly erroneous. With respect to the latter, appellant contends, *inter alia*, that the district court clearly erred in finding that James Irvine did not have possession of the trust indenture subsequent to its execution; that the indenture of trust was not found in his safe deposit boxes after his death; that the trust indenture, following its execution, was delivered to The James Irvine Foundation and was in its possession thereafter; that the certificates of stock were endorsed in blank and delivered to the Foundation; and that appellant failed to meet her burden of establishing the nondelivery of the contested shares.

Rule 52(a) of the Federal Rules of Civil Procedure instructs reviewing courts to pay due regard to the opportunity of the trial court to judge the credibility of witnesses, and enjoins the setting aside of findings of fact except where "clearly erroneous." It is said that a finding

is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See also, Harries v. United States, 350 F.2d 231, 235 (C.A.9, 1965); Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541, 548 (C.A.9, 1949). And it is now settled that in reviewing the record we are not to retry the issues of fact nor to supplant the district court's judgment with that of our own. Tonkoff v. Barr, 245 F.2d 742, 750 (C.A.9, 1957); General Casualty Co. v. School District No. 5, 233 F.2d 526, 527 (C.A.9, 1956); Carr v. Yokohama Specie Bank Ltd., 200 F.2d 251, 255 (C.A.9, 1952). Rather, since it is presumed on appeal that the district court's findings are correct. Glens Falls Indemnity Co. v. United States, 229 F.2d 370, 373 (C.A.9, 1955); Anderson v. Federal Cartridge Corp., 156 F.2d 681, 684 (C.A.8, 1946), our role is limited to that of determining whether appellant has rebutted this presumption of correctness by demonstrating that contrary findings are warranted when the evidence is taken as a whole and considered in a light most favorable to the appellees. Harries v. United States, supra at 235; Wineberg v. Park, 321 F.2d 214, 218 (C.A.9, 1963). In our view, appellant has failed to carry her burden in this respect, for after considering her assertions and after thoroughly examining the voluminous record in this appeal, we are far from a "definite and firm conviction that a mistake has been committed." To the contrary, we are not in the slightest convinced that the district court's

findings are erroneous — clearly or otherwise; consequently, those findings will not be disturbed.

Appellant's attacks upon the district court's application of the law to the facts is as unpersuasive as her challenges to the findings of fact. Among other things appellant contends that the district court erred in concluding that the trust indenture did not establish a mere agency but rather a valid trust for charitable purposes; that the trust was exempt from the California Rule Against Perpetuities; and that it was not the intention of James Irvine in executing the trust indenture to invest the directors of The James Irvine Foundation with uncontrolled discretion to continually freeze all of the income into principal and thereby defeat the charitable purposes and objectives of the trust.

We have carefully reviewed the decision in the full light of appellant's vigorous and broadly-based assault upon it.[1] The district court, properly applying the California law, skillfully organized a complex of issues into a comprehensive legal mosaic. We can find no error.

Affirmed.

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[1] We have also given due consideration to the material submitted to the court by the appellant at oral argument.

Office of the Clerk
U. S. COURT OF APPEALS
P. O. Box 547
San Francisco, California 94101

Dec 18 1968

Lyndol L. Young, Esq.
Attorney at Law
612 South Flower St.
Los Angeles, Calif. 90017

Dear Sir:

The Petition for a Rehearing ..... heretofore filed in case No. 22607 — ATHALINE IRVINE SMITH vs. JAMES IRVINE FOUNDATION was this day denied.

Pursuant to Rule 41(a) and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

WM. B. LUCK,
Clerk.

APPENDIX A1

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ATHALIE IRVINE SMITH,
Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, et al.,
Appellees.

No. 22,607

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed with costs in this Court in favor of the appellees and against the appellant.

Costs:

Rep. copy of record:	$ 16.70;
Brief appellees:	1,829.48.
Total:	$1,846.18

Filed and entered OCT. 14, 1968

APPENDIX A2

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, December 18, 1968

Before: PICKETT, STALEY, and JONES, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed November 20, 1968 and within time allowed therefor, and valid extension thereof, by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX A3

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
DEC. 18, 1968
WM. B. LUCK, CLERK

ATHALIE IRVINE SMITH,
Appellant,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, et al.,
Appellees.

22607

ORDER

Before: PICKETT*, STALEY*, and JONES*, Circuit Judges

Appellant's petition for rehearing is denied

JOHN C. PICKETT
HUSTIN L. STALEY
WARREN L. JONES
United States Circuit Judges

* Sitting in the Ninth Circuit by Designation

APPENDIX B

Athalie Irvine SMITH, Plaintiff,

v.

THE JAMES IRVINE FOUNDATION, a Corporation et al., Defendants.
Civ. A. No. 66-1285.

United States District Court
C. D. California.
Dec. 18, 1967.

MEMORANDUM

GRAVEN, Senior District Judge (by assignment).

The plaintiff in this action is an heir at law and a beneficiary under the will of James Irvine, deceased. He was her paternal grandfather. She commenced this action on August 10, 1966. She asks that certain shares of corporate stock of The Irvine Company standing in the name of The James Irvine Foundation be held to be a part of the assets of the estate of James Irvine. She also asks for damages and an accounting in connection therewith. The trial was to the Court. By agreement of the parties, the matter of damages and accounting was to await the determination of the other issues in the case. Jurisdiction is based upon diversity of citizenship. The plaintiff is a citizen of the State of Virginia. All of the defendants, for federal court jurisdictional purposes, are citizens of the State of California. The applicable substantive law is that of the State of California.

The stock involved constitutes the majority of the stock of The Irvine Company. That corporation has large assets. Its largest asset is a tract of land known as The Irvine Ranch. That ranch consists of approximately 88,000 acres of land in Orange County, California. It is in the metropolitan area of Los Angeles. Estimates of the present value of the ranch range from one-half billion dollars to a billion and one-half dollars. The ranch was a consolidation of early Spanish land grants, which consolidation was made by the father of James Irvine who was an early California pioneer. He died on March 15, 1886, and James Irvine, his only child born in 1867, succeeded to the ownership of the ranch. In 1894 he caused The Irvine Company to be incorporated under the laws of West Virginia. Its capital stock consisted of 1,000 shares of common stock, all of which, except qualifying shares, were issued to him. He owned the qualifying shares by endorsement. James Irvine transferred the ownership of the ranch to the corporation. The principal place of business of the corporation has been and is the ranch. The ranch has been the subject matter of numerous writings, among which are the books by Robert Glass Cleland, "The Irvine Ranch" (1962) and "The Irvine Ranch of Orange County" (1952), both of which were exhibits in the case.

James Irvine was a shrewd and successful business man. He greatly augmented the property that came to him from his father. During his entire lifetime James Irvine was a resident of the City of San Francisco, San Francisco County, California, where he maintained his place of business.

He was President of The Irvine Company from the time of its incorporation until his death on August 24, 1947. Upon his death his son Myford, who had been closely associated with him in his business affairs, became President of the company and continued as such until his death on January 11, 1959.

Commencing sometime prior to 1936 James Irvine began to give consideration to the matter of establishing a foundation. He caused The James Irvine Foundation to be incorporated under the laws of the State of California. Its articles of incorporation are as follows:

"ARTICLES OF INCORPORATION
OF
THE JAMES IRVINE FOUNDATION

KNOW ALL MEN BY THESE PRESENTS:

"That we, the undersigned, incorporators and first directors of The James Irvine Foundation, have executed this instrument for the purpose of forming a corporation under the laws of the State of California, and we hereby certify and declare

"FIRST: That the name of this Corporation is 'THE JAMES IRVINE FOUNDATION'

"SECOND: That this coropration is formed solely for charitable purposes, namely, public welfare, health, education, comfort, happiness and general well-being particularly of the citizens and residents of the State of California, or any part thereof, and

that this is a corporation which does not contemplate pecuniary gain or profit to the members thereof. Incidental to and for the purpose of carrying out the aforesaid purpose, this corporation shall have power to receive property by gift, devise or bequest and otherwise to acquire and hold all property, real or personal, including shares of stock, bonds and securities of other corporations; to act as trustee under any trust incidental to the aforesaid purposes of this corporation, and to receive, hold, administer, and expend funds and property subject to such trust; to convey, exchange, lease, mortgage, encumber, transfer upon trusts or otherwise handle or dispose of any and all property, real and personal; to borrow money, contract debts, and issue bonds, notes and debentures and secure the same; to contract and be contracted with; to sue and be sued and to do any and all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation.

"THIRD: The principal office for the transaction of the business of the corporation is to be, and shall be, located in the City and County of San Francisco, State of California.

"FOURTH: The names and addresses of the persons who are to act in the capacity of directors of this corporation until the selection of their successors and who shall constitute the number of directors of this corporation are as follows:

Name	Address
Myford Irvine	San Francisco, California
Katharine Irvine	San Francisco, California
W. H. Spaulding	San Francisco, California
N. L. McLaren	San Francisco, California
James G. Scarborough	Los Angeles, California
Paul A. Dinsmore	San Francisco, California
A. J. McFadden	Santa Ana, California

"FIFTH: The authorized number and qualifications of the members of this corporation are as follows:

"The members of this corporation shall be seven in number and each member shall be a director of this corporation. Vacancies in any number of members or directors for any cause shall not dissolve or otherwise affect the existence of this corporation, but the remaining members and directors shall function; provided that vacancies must be filled that there shall be not less than five members and directors, and if at any time the number of members and directors shall for any cause be reduced to less than five, the remaining members and directors shall take not action until the number has been increased to five, except to so increase the number; provided, further, that the number of members and directors shall not be permitted to continuously remain at less than seven for a longer period than one year. Vacancies shall be filled by affirmative vote of the remaining members; provided that no new member of this

corporation shall be chosen or elected, whether to fill a vacancy or otherwise, except by affirmative vote of at least five of the then members of this corporation, unless for any cause the number be reduced to less than five, then only by the unanimous affirmative vote of the then remaining members. All memberships shall be of one class and each member shall have equal voting rights with each other member, and no member shall be liable for any dues or assessments or debts, liabilities or obligations of the corporation. This is and shall always remain a charitable corporation, and no member or director thereof shall ever have, own, or enjoy any personal property right or interest in or to any of the property of this corporation.

"SIXTH: The term of this corporation shall be perpetual.

"SEVENTH: These articles of incorporation and any provision or provisions thereof may be amended in any lawful manner, with affirmative vote or written consent of not less than six of the members of this corporation; provided, however, that never, so far as it is lawful so to provide, shall the purposes of this corporation be changed or any of its property be diverted from the charitable uses and purposes for which this corporation is formed.

"A code of by-laws of this corporation shall be adopted by the written consent of all the members thereof.

"IN WITNESS WHEREOF, we have hereunto set our hands this 1st day of December, 1936.

MYFORD IRVINE
KATHARINE IRVINE
W. H. SPAULDING
N. L. McLAREN
JAMES G. SCARBOROUGH
PAUL A. DINSMORE
A. J. McFADDEN"

The members of the first Board of Directors were designated by James Irvine. They included his son Myford and his wife, Katharine. They both served as such during their lifetimes. James Irvine was never a Director or an officer of the Foundation. Members of his family at all times constituted a minority of the Board of Directors. The Directors constituted the members of the Foundation.

On February 24, 1937, James Irvine executed an indenture of trust in which that Foundation was designated as trustee. In the indenture of trust it is stated that he transferred, assigned and set over to the trustee 505 shares of stock of The Irvine Company. Later five additional shares of stock of The Irvine Company were included. In 1963 the company redeemed a number of its shares. At the present time there are 855 shares of its stock outstanding of which 459 shares stand in the name of The James Irvine Foundation. This litigation revolves around the status of those shares.

James Irvine died testate on August 24, 1947. His will, dated May 14, 1946, was admitted to probate by the

Superior Court of the State of California In and For the City and County of San Francisco on September 17, 1947. On December 29, 1952, a final decree of distribution of the assets of his estate was entered by that Court and the estate closed. The 510 shares of stock of The Irvine Company were not administered on in the estate proceedings nor included in the decree of distribution. It is the claim of the plaintiff that they should have been included in the distribution of the property of the estate. She asks, as heretofore noted, that they now be held to be a part of the assets of the estate.

In the plaintiff's original complaint herein the defendants were The James Irvine Foundation, The Irvine Company, N. Loyoll McLaren, A. J. McFadden, James G. Scarborough, Robert H. Gerdes, Kate L. Wheeler, James H. Metzgar, Edward W. Carter, Mark R. Sullivan, John V. Newman, John A. Murdy, Jr., Morris M. Doyle, and William Bradford Hellis. The individual defendants named either are or had been Directors of The James Irvine Foundation. Except for Kate L. Wheeler, none of the individual defendatns were relatives of James Irvine or individually interested in his estate. Kate L. Wheeler is an heir at law and a beneficiary under the will of James Irvine. He was her maternal grandfather. Presently she is the only member of the James Irvine family serving on the Board of Directors of the Foundaion.

The defendants filed a motion stating that there were certain other parties who, because of their interests in the subject matter of the action, should be made parties to the action. Those parties designated were Linda Irvine

Gaede; Gloria Wood Irvine and Security First Naional Bank as Executors and Trustees of the Estate of Myford Irvine; William Thornton White, Jr., Executor of the Estate of Katherine Brown Irvine; N. Loyall McLaren and Robert H. Gerdes in their capacity as Trustees of the Trusts established by the will of James Irvine, Deceased; and Thomas C. Lynch, Attorney General of the State of California. The parties named other than the Attorney General were either beneficiaries under the will of James Irvine or representatives of beneficiaries under his will. Without objection, an order was entered joining all of the parties designated as additional defendants.

James Irvine had three children: James III, Kathryn Helena and Myford. James Irvine III and Kathryn Helena predeceased him. The plaintiff is a daughter of James Irvine III, James Irvine III died in 1935. The plaintiff was born in 1933. She attained her majority by marriage in 1952. During her minority her mother was guardian of her person and property. Kate L. Wheeler is a daughter of Kathryn Helena. Kathryn Helena died in Myford Irvine survived James Irvine. He died testate on January 11, 1959. His estate is still open. The defendant Linda Irvine Gaede is his daughter. James Irvine established a number of trusts under his will. N. Loyall McLaren and Robert H. Geredes are the trustees of those trusts. Katharine Brown Irvine, the wife of James Irvine, survived him. She was a beneficiary under his will. She died in 1950. Her estate is still open. All of the persons having an interest in the estate of James Irvine are parties to this action either individually or by representation. Thomas C. Lynch, Attorney General of the State of Cali-

fornia, is a party in interest under the provisions of the Uniform Supervision of Trustees for Charitable Purposes Act (California Government Code), Sections 12580-12595. Section 12591 of that Act provides, in part:

> "* * * No court shall have jurisdiction to modify or terminate any trust of property for charitable puurposes unless the Attorney General is a party to the proceedings."

After the additional parties were joined, the plaintiff amended her complaint accordingly. The defendant The Irvine Company takes the position, and correctly so, that none of its rights and interests are involved. The defendants Linda Irvine Gaede and William Thornton White, Jr., as Executor of the Estate of Katharine Brown Irvine, each take what is, in substance, a neutral position. All of the other defendants ask that the stock in question be held to be the property of The James Irvine Foundation and that the trust be held to be a valid charitable trust. For convenience in reference, when reference is made to the contentions of the defendants such will refer to the contentions made by some of the defendants other than the defendants The Irvine Company, Linda Irvine Gaede and William Thornton White, Jr., as Executor of the Estate of Katharine Brown Irvine, Deceased.

The James Irvine Foundation, as heretofore noted, was incorporated on January 6, 1937. On February 1, 1937, an organizational meeting of the Foundation was held. Myford Irvine was elected President. He continued to serve as such until his death in 1959. E. M. Price (Miss Edna M. Price) was elected Secretary and Treasurer. She served as such until her death in 1959.

On February 24, 1937, James Irvine executed the indenture of trust heretofore referred to. That indenture is next set forth:

"THIS INDENTURE OF TRUST, made this 24th day of February, 1937, by and between JAMES IRVINE, of San Francisco, California, Trustor, and THE JAMES IRVINE FOUNDATION, a corporation organized and existing under the laws of the State of California, trustee,

WITNESSETH:

"That the trustor hereby transfers, assigns and conveys to the trustee, to have and to hold in trust, nevertheless and for the following trust uses and puurposes, the following securities, to-wit:

"—505—shares of the capital stock of The Irvine Company, a corporation organized and existing under the laws of the State of West Virginia, and evidenced by the following certificates for the following number of shares, to-wit:

Certificate Number	Number of Shares
28	332
33	132
42	41

"Also, the 200 shares of the capital stock of the Irvine Company now evidenced by Certificate Number 40, and now held in trust under the terms set forth in that certain Indenture of Trust dated May 21, 1921, between James Irvine, Jr., and James Irvine, and all interest, preent and future, of the trustor herein in or to said 200 shares or any thereof.

"Also—12,750—shares of The Moraga Company, a corporation organized and existing under the laws of the State of California, and evidenced by the following certificates for the following number of shares, to-wit:

Certificate Number	Number of Shares
33	10,200
54	400
55	400
56	400
57	400
58	200
66	100
67	200
68	200
69	200
71	50

"It is understood and hereby made an express term and condition of this trust that other and additional or other property may from time to time hereafter be added by the trustor to the trust property and become a part of the corpus of this trust, to be held under all of the terms hereof.

"It is also understood and hereby made an express term and condition of this trust that the trustor may at any time and from time to time, at his sole will and discretion, by written instrument filed with the trustee, revoke this trust in whole or in part, and may withdraw therefrom all or any part or parts of the property which may have been contributed to this trust by him, including all or any part or parts of the stocks hereinabove specifically described; and upon any such withdrawal, the trustee shall forth-

with convey and transfer by proper instruments and deliver the property affected thereby to the trustor; and the trustor may at any time amend this trust without limitation, or amend or cancel any amendments thereto.

"It is a further express condition of this trust that the trustor does hereby reserve to himself the sole and absolute right to receive, and said Trustor shall receive, during his lifetime, as his sole and separate property, all rents, interests, dividends, earnings, profits and other income from the Trust property, and also any liquidating dividends and other moneys or property which constitute withdrawals from, or diminution of capital (whether of any corporation whose stock is held hereunder or of any other trust property hereunder) and which when paid to and received by the Trustor would not constitute taxable income of the Trustor. The Trustor also reserves to himself, and he shall have the sole right, during his lifetime, to vote each and all of the shares of stock held in this trust. The Trustor hereby binds himself, during his lifetime, to pay, when due, all taxes, assessments, insurance, liens, charges and/or expenses necessary or proper for the preservation, maintenance or care of the trust property.

"Any proceeds or profits from the corpus of the trust property (as distinguished from income thereof), which may accrue during the lifetime of the Trustor, and also all liquidating dividends and all other payments to the Trustor or the Trustee out of capital (whether of any corporation whose stock is held hereunder or of any other trust property hereunder) other than as

hereinabove [*sic*] specifically reserved to the Trustor, shall be paid to and shall be invested by the Trustee in such property or securities as may be approved by the Trustor, and all rents, interest, dividends and other income of any such investments shall, during the lifetime of the Trustor, be paid to and belong to the Trustor as his sole and separate property.

"After the death of the Trustor, all rents, interest, dividends and other income and profits of the trust property shall be collected and received by the Trustee and shall be used, applied and devoted as follows:

"1. There shall first be paid out of the same all taxes, general and special assessments and all costs, charges and expenses incurred or expended in the collection, care, administration and protection of the trust property, for the payment of which this trust and/or the Trustee may become chargeable, including the protection of this trust, and its defense against legal attack, and also including any and all compensation to, and/or traveling and other expenses of, the officers, directors or employees of the Trustee in connection with their services in the care, administration and protection of the trust property, as the Board of Directors of the Trustee, in its discretion, may deem reasonable or necessary. Then there shall be paid out of said income from time to time, as the Board of Directors of the Trustee may in its discretion determine, such amounts as may be necessary to make good or replace losses suffered in the corpus of the trust property.

"2. Out of the balance of said income, after the deductions hereinabove provided, the Trustee may, and

in the judgment of the Trustor should, each year set aside such sum as the Board of Directors of the Trustee shall in its sound discretion deem wise and expedient for investment, and said Trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investments, when made, shall become a part of the corpus or principal of the trust property, and the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided.

"3. The balance of said income, after the deductions and investments hereinabove provided, shall be used, applied and devoted by the Trustee exclusively to or for the advancement of any charitable use or purpose in the State of California as now is or may hereafter be authorized in the Articles of Incorporation of the Trustee and as the Board of Directors of the Trustee shall from time to time, in its discretion, select and determine; provided, however, that no part of the net income or earnings of the trust property shall inure to the benefit of any member of The James Irvine Foundation, Trustee, nor shall any part thereof be used, applied or devoted to or for any other purpose than as hereinabove specified. Such income shall be used and applied by the Trustee, either by making donations or contributions to established charities exclusively engaged in the promotion of the purposes hereinabove mentioned, or by the establishment and/or support in whole or in part by the Trustee of charities devoted exclusively to the promotion of the same purposes, provided that all of such income shall not be devoted to any one or two charities to the exclusion of others.

"To carry out the express purpose of this trust and in aid of its execution and the proper administration, management and application of the trust property, the Trustee is vested, after the death of the Trustor, with the following additional powers and discretions:

"1. To have, respecting the shares of stock hereinabove described and all other securities which may be held in this trust, all the rights, powers and privileges of an owner, including the voting thereof and giving proxies therefor; provided, however, that the Trustee shall have no power to and shall not, except only by the affirmative vote of all of the members of the Board of Directors of the Trustee, sell, encumber, or otherwise dispose of any of the shares of stock of The Irvine Company held by the Trustee under this trust, and shall hold, maintain and administer the same under this trust as a unit without division or segregation thereof.

"2. As to any property which may hereafter be added to this trust, or any part thereof (exclusive of the shares of stock of The Irvine Company): to manage, control, sell, convey, lease, partition, subdivide, exchange, improve and to encumber by mortgage, trust deed or otherwise the same, at such times and in such manner and in accordance with such procedure and on such terms as the Board of Directors of the Trustee may, in its discretion, deem advisable.

"3. To invest, reinvest and keep invested the principal proceeds of the trust property and any accumulated income therefrom not used and applied as hereinabove provided in any property or securities which the Trustee shall deem proper and advisable, whether or not

permissible by law as investment for trust funds; provided that no part of the income therefrom shall be used or applied for any purpose other than as in this trust provided.

"4. All discretions in this trust conferred upon the Trustee shall, unless specifically limited, be absolute and uncontrolled, and their exercise by the Board of Directors of the Trustee conclusive on all persons interested in this trust.

"5. The powers and discretions of the Trustee enumerated herein are not to be construed as a limitation upon its general powers and discretions, but the Trustee and the Board of Directors thereof, as the same may from time to time be constituted, in addition thereto is hereby vested with and shall have, after the death of the Trustor and for the full duration of this trust thereafter, as to the trust property, the income therefrom and in the execution of this trust, the same powers and discretions that an absolute owner of property has or may have, subject to the provisions and conditions of this trust.

"Trustor hereby makes the following directions with respect to the management of the shares of stock of the Irvine Company and the property thereof, which consists for the most part of a land holding situated in Orange County, California; that inasmuch as the development and operation of said property has constituted the life work of the Trustor, it is the purpose of said Trustor, by the creation of this trust and by vesting in the Trustee through its holding of said stock of The Irvine Company, the exercise of a controlling voice in the operation of its properties, to perpetuate the opera-

tion thereof and thus insure an adequate foundation for the charitable purposes herein provided. It is the Trustor's firm conviction that no other security could afford The James Irvine Foundation a more safe and stable investment than the capital stock of The Irvine Company, if this land holding is preserved and sustained at its present state of development, with such improvements, if any, as may be justified in the future. Portions of the land adjacent to and near the Pacific Coast and Newport Bay might from time to time be advantageously disposed of in various small parcels or units, and hill and unimproved property in larger units; but the great central valley acreage, together with such lands as are essential to the maintenance of the water supply thereto, should, in the judgment of the Trustor, be held and operated as a unit. The Trustor also cautions against disbursement of too large a part of the income or surplus of The Irvine Company. In furtherance of the policy heretofore established, liberal reserves of income must be accumulated and held for future needs and against unforeseen contingencies which have never yet failed to recur. For example, very large sums have already been expended out of accumulations of income in the construction of dams, the drilling of wells and installation of water distribution systems on and in the improvement of this property. Large expenditures will be required in the future to sustain and maintain such development and improvement.

"The Trustor has no intention or desire to restrict the Trustee in its selection of the specific charities to be benefitted [*sic*] by this trust, nor to make any exclusive designation thereof. Nevertheless, the Trustor inter-

prets the charitable purposes of The James Irvine Foundation as stated in its Articles of Incorporation to include financial and generally to worthy individuals, who through illness or misfortune are temporarily in need. There is, for example, a very large body of self-respecting citizens who are not wealthy enough to afford for their families and themselves that same high quality of medical and surgical and hospital care which is open to the wealthy and also the very poor. It is the desire and hope of the Trustor that The James Irvine Foundation may find a means of extending such temporary aid to as many as possible of these worthy individuals and families, and in so doing, that worthy citizens and families residing in Orange County, California, be not overlooked.

"The Trustor also suggests that a revolving fund be created for loans not to exceed in the aggregate One Thousand Dollars ($1,000.00) per person, with very moderate rates of interest, to worthy students and scholars who are in need of financial aid to carry on their studies in institutions of learning in California, and also in moderate amounts to scientists or individuals engaged in research work who require financial assistance therein.

"It is also the direction of the Trustor that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust, but that all such property, available from time to time for the benefit of charities, shall be used for such charities as do not enjoy any substantial support through taxation.

"IN WITNESS WHEREOF, the Trustor has executed these presents on the day and year first hereinabove written, and the Trustee has also executed these presents at the same time by its officers thereunto duly authorized, in token of the acceptance by the Trustee of the trusts hereinabove set forth.

JAMES IRVINE

Trustor

THE JAMES IRVINE FOUNDATION

By Myford Irvine

President

By E. M. Price

Secretary

Trustee"

At the annual meeting of the members of The James Irvine Foundation held on May 25, 1937, the following appears in the minutes thereof:

"Upon motion duly made and seconded, the following resolution was unanimously adopted:

"RESOLVED, that the acts and deeds of Myford Irvine as President and E. M. Price as Secretary, respectively, of this corporation, The James Irvine Foundation, in executing for and in behalf of and as the corporate act and deed of this corporation, that certain Indenture of Trust dated the 24th day of February, 1937, between James Irvine as Trustor and this corporation as Trustee, and in accepting the trusteeship created by and under said Indenture of Trust and also in accepting delivery for and in behalf of this cor-

poration as trustee under said Indenture of Trust, of the certificates of stock described in said Indenture of Trust, to-wit, 505 shares of the capital stock of The Irvine Company, and 12,750 shares of the capital stock of The Moraga Company * * *, be and each and all of said acts are, hereby ratified, approved, confirmed and adopted as the acts and deeds of this corporation to the same effect for all purposes as if expressly theretofore authorized by express resolution of the Members of this corporation * * *."

On June 20, 1946, James Irvine addressed a letter to the Foundation. That letter, with the receipt of The James Irvine Foundation appearing thereon, was as follows:

"820 Crocker Building,
San Francisco, California,
June 20, 1946.

The James Irvine Foundation,
820 Crocker Bldg.,
San Francisco, California.

Attention: Mr. Myford Irvine,
President.

Gentlemen: —

Acting pursuant to the terms of that certain Indenture of Trust dated the 24th day of February, 1937, wherein I am Trustor and the James Irvine Foundation is Trustee, and wherein it is provided in part as follows:

It is understood and hereby made an express term and condition of this trust that other and additional

securities or other property may from time to time hereafter be added by the Trustor to the trust property and become a part of the corpus of this trust, to ne [*sic*] held under all of the terms hereof,

It is also understood and hereby made an express term and condition of this trust that the Trustor may at any time and from time to time, at his sole will and discretion, by written instrument filed with the Trustee, revoke this trust in whole or in part, and may withdraw therefrom all or any part or parts of the property which may have been contributed to this trust by him, including all or any part or parts of the stocks hereinabove specifically described; and upon any such withdrawal, the Trustee shall forthwith convey and transfer by proper instruments and deliver the property affected thereby to the Trustor; and the Trustor may at any time amend this trust without limitation, or amend or cancel any amendments thereto.

I herewith hand to you as an addition to the trust property of said trust the following securities standing in my name and endorsed by me in blank:

Certificate No. 34 for 2 shares of The Irvine Company

Certificate No. 43 for 1 share of The Irvine Company

Certificate No. 44 for 1 share of The Irvine Company

Certificate No. 53 for 1 share of The Irvine Company

and revoke the said trust as to 12,750 shares of The Moraga Company, withdraw the said shares therefrom and request and require that you forthwith deliver to me a certificate or certificates for said number of shares of the said The Moraga Company.

By handing to you the signed original of this letter, I hereby acknowledge receipt of the said 12,750 shares of The Moraga Company. I request that you acknowledge reecipt [*sic*] of said above numbered certificates for shares of stock of The Irvine Company by The James Irvine Foundation upon the copy of this letter and return such copy to me.

Very truly yours,

(Signed) James Irvine"

"I hereby acknowledge receipt on behalf of The James Irvine Foundation from James Irvine of the above-mentioned certificates for five (5) shares of stock of The Irvine Company as an addition to said trust property as provided in the above-mentioned Indenture of Trust, dated the 24th day of February, 1937.

THE JAMES IRVINE FOUNDATION,

(Signed) By: Myford Irvine,
President."

At a meeting of the Board of Directors of the Foundation held on June 26, 1946, the following appears in the minutes thereof:

"The President advised that he had accepted the five shares of stock of The Irvine Company as an ad-

dition to the trust property referred to in said instrument dated June 20, 1946 and had returned to Mr. James Irvine the 12,750 shares of stock of The Moraga Company, which had been withdrawn from said Trust.

"After discussion of the matter, upon motion, duly made and seconded, the following resolution was unanimously adopted—

"RESOLVED, that the said five shares of stock of The Irvine Company be and they are hereby accepted as an addition to the trust property provided for in that certain Indenture of Trust dated the 24th day of February, 1937, wherein James Irvine is Trustor and this corporation is Trustee; and, the act of the President in accepting said shares of stock be and the same is hereby ratified, confirmed and approved as the act and deed of this corporation.

"FURTHER RESOLVED that the act of the President in returning said 12,750 shares of stock of The Moraga Company to James Irvine pursuant to the request contained in said instrument of said James Irvine dated June 20, 1946, be and the same is hereby ratified, confirmed and approved * * *"

The history of the stock certificates involved will next be noted. The indenture of trust of February 24, 1937, described 3 certificates of stock: certificate No. 28 for 332 shares, certificate No. 33 for 132 shares, and certificate No. 42 for 41 shares, or a total of 505 shares. In his letter of June 20, 1946, certificate No. 34 for 2 shares, certificate No. 43 for 1 share, certificate No.

44 for 1 share, and certificate No. 53 for 1 share, totalling 5 shares, were included in the indenture of trust. All of the certificates referred to were endorsed in blank by James Irvine. On April 21, 1941, certificate No. 33 for 132 shares and certificate No. 42 for 41 shares included in the original indenture were surrendered to the company. Certificates Nod. 45, 46, 47, and 48 for 10 shares each, certificates Nod. 49 and 50 for 5 shares each, and certificate No. 51 for 123 shares were issued in lieu thereof. All of those certificates were endorsed in blank by James Irvine. On November 7, 1947, following the death of James Irvine, Edna M. Price, the Secretary and Treasurer of The James Irvine Foundation, sent in for a transfer to the Foundation the certificates just described totalling 173 shares, together with certificate No. 28 for 332 shares and the certificates for 5 shares described in the letter of James Irvine of June 20, 1946. The certificates were accompanied by the consents of the inheritance tax departments of the States of West Virginia and California. Thereupon, certificate No. 54 for 510 shares was issued to The James Irvine Foundation on November 18, 1947. In 1963 a partial redemption of the stock in The Irvine Company was made following which the total number of shares of stock outstanding was reduced to 855. Upon the partial redemption, The James Irvine Foundation was issued a certificate for 459 shares which is the stock in controversy in this action.

James Irvine made a number of gifts to the Foundation which do not involve the stock of The Irvine Company. Those gifts are not involved. There is not involved the status of The James Irvine Foundation. It was and is a

valid charitable corporation. It has been given a federal tax exempt status by the Commissioner of Internal Revenue.

The contentions of the parties as stated by them in their pleadings and briefs will next be noted. The plaintiff contends:

1. That the indenture of trust is void and invalid as an attempted testamentary disposition by James Irvine, the trustor, since the indenture of trust was not executed in accordance with the requirements of the laws of California with reference to the execution of wills and, further, that the indenture of trust was a mere abortive and ineffectual testamentary disposition.

2. That the indenture of trust contains both non-charitable and charitable provisions which are so inseparably blended together that the same render the indenture of trust invalid and void in its entirety. That said provisions further suspend the power of alienation of the trust corpus and income in perpetuity contrary to law. A provision of the indenture of trust excludes from its benefits and charity all organizations as beneficiaries thereunder which are substantially supported by taxation or tax funds. That provision further renders the indenture of trust invalid and void. That the giving of the control of The Irvine Company to the trustee was illegal and contrary to public policy.

3. That the indenture of trust was absolutely void for all purposes and created no trust whatsoever because it conveyed neither legal nor equitable title to the Irvine Stock in praesenti.

4. That there was no delivery of the Irvine stock or the indenture of trust by Mr. Irvine, as trustor, to The James Irvine Foundation, as trustee, or any possession or control thereof by the trustee until after the death of the trustor.

5. That upon the death of James Irvine the shares of stock of The Irvine Company referred to in the indenture of trust descended to the plaintiff and the other heirs or testamentary beneficiaries of James Irvine and that the said shares of stock (now 459 shares) should be awarded and distributed to the plaintiff and the other heirs or testamentary beneficiaries. The defendants contend:

1. That the indenture of trust created a valid charitable trust.

2. That the Foundation became the valid owner of the shares of stock in question and is the valid owner of them.

3. That the plaintiff's action is barred by laches.

4. That the plaintiff's action is barred by the statute of limitations.

5. That the plaintiff's action is barred by estoppel.

6. That the final decree of distribution in the estate of James Irvine is res adjudicata as to the claims of the plaintiff and hence is a bar to this action.

The plaintiff's contentions have two phases. One phase relates to the actions of James Irvine in connection with the indenture of trust and the shares of stock of the Irvine Company and the other relates to the provisions of the indenture of trust itself. The plaintiff contends

that the actions of James Irvine in connection with the indenture and the certificates of stock in question were such that neither legal nor equitable title passed to the Foundation in praesenti. In that connection she asserts that there was no delivery of the indenture of trust or the certificates of stock by James Irvine or any possession or control thereof by the Foundation until after the death of James Irvine. It is the contention of the plaintiff that James Irvine retained possession of the indenture of trust and the shares of stock in question until his death. It is the contention of the defendants that upon the execution of the indenture of trust by James Irvine it was delivered by him to the Foundation and that at all times thereafter it was in the possession of the Foundation. It is the contention of the defendants that the certificates of stock described in the indenture of trust and in the letter of James Irvine dated June 20, 1946, which had been endorsed in blank were delivered to the Foundation upon the execution of those instruments and that thereafter it was at all times in possession of those certificates or those issued in lieu thereof.

Since the principal transactions here under consideration took place more than thirty years ago, quite a number of persons who had to do with those transactions have died. Among such persons were Myford Irvine who was President of the Foundation and Miss Edna M. Price who was Secretary of the Foundation at the time of the transactions here involved. Some records which might bear on the transactions were not preserved. Because of storage problems, some ten years after the death of James Irvine and some six or seven years after the probate of his estate had been concluded, and when

no litigation was pending or threatened in connection with his business affairs, his personal business records, after legal consultation, were disposed of. However, a number of persons who had familiarity with certain pertinent matters were still living and testified, and a considerable amount of documentary evidence relating to those matters was available and introduced into evidence.

There was a considerable amount of evidence presented relative to the matter of the possession of the certificates of stock in question and the indenture of trust during the lifetime of James Irvine. The greater part of that evidence related to the question as to whether the certificates of stock in question were kept by James Irvine in one of his safety deposit boxes during his lifetime or whether they were kept in the possession of the Foundation and kept in its safety deposit box.

The plaintiff and the defendants each call particular attention to certain documentary evidence and certain testimony in support of their contentions. The documentary evidence and the testimony to which the defendants more particularly call attention to in support of their contentions will next be referred to.

It was heretofore noted that on February 1, 1937, shortly prior to the execution of the indenture of trust on February 24, 1937, an organizational meeting of the Foundation was held at which Myford Irvine was elected President and Miss Edna M. Price was elected Secretary of the Foundation. At that meeting the following resolution was adopted by the Foundation:

> "RESOLVED, that E. M. Price, the secretary of this corporation, the James Irvine Foundation, a

California corporation, be and she is hereby authorized and empowered to rent a Safe Deposit Box for and in the name of this corporation at the Safe Deposit Vaults of the Crocker First National Bank of San Francisco and that access to such box shall be had only by Myford Irvine, the president, Paul A. Dinsmore, the vice-president, and E. M. Price, the secretary of such corporation, or any two of them, and that said three persons, to-wit: said Myford Irvine and Paul A. Dinsmore and E. M. Price, or any two of them, are hereby authorized and empowered for and in the name of and on behalf of this corporation to enter said box and place anything therein or remove therefrom any of the contents thereof."

Pursuant to that resolution, a safety deposit box was rented by the Foundation on April 20, 1937. That rental continued until July 22, 1965. James Irvine was never a Director or officer of the Foundation. He was never included among those specified to have access to its box.

On May 25, 1937, as heretofore noted, at a meeting of the members of the Foundation, a resolution was adopted ratifying the acceptance of the trusteeship under the indenture of February 24, 1937, by Myford Irvine and E. M. Price and the delivery of the certificates of stock described in the indenture which were certificates for the 505 shares of Irvine Company stock.

On June 20, 1946, as heretofore noted, James Irvine by letter included five additional shares of Irvine stock under the indenture of trust. On June 22, 1946, Kent

Sawyer, who was an attorney for James Irvine, wrote him a letter a portion of which was as follows:

"Mr. James Irvine
820 Crocker Building
San Francisco, California

Re: Transfers of Stock to
James Irvine Foundation

Dear Mr. Irvine:

In my discussion with you and Miss Price on June 21, it was brought to our attention by Miss Price that The James Irvine Foundation holds the stock certificates transferred by you to it endorsed in blank without registration on the books of corporations.

* * *."

On July 9, 1946, Kent Sawyer wrote James Irvine a letter in which he stated that he confirmed his telephone advice that under the West Virginia Uniform Stock Transfer Act as long as the certificates of stock had been delivered there was no necessity of having the transfers entered on the books of The Irvine Company.

James Irvine died in the State of Montana on Sunday, August 24, 1947. At the time of his death he was the lessee of three safety deposit boxes. Two were rented from the Crocker First National Bank and were numbered 3550 and 4416. One was rented from the Wells Fargo Bank and was numbered 1412. The Irvine Company was a lessee of a safety deposit box with the Crocker First National Bank numbered 3867. On Tuesday, August 26, 1947, the banks sealed all the safety deposit boxes of which James Irvine was the lessee. Un-

der the prevailing practice or rule, the safety deposit box or boxes of a corporation in which a decedent was an officer were sealed along with the decedent's personal safety deposit box or boxes. Under that practice or rule, the Crocker First National Bank sealed the safety deposit box of The Irvine Company.

The office of the Treasurer of the City and County of San Francisco was notified of the death of James Irvine and the sealing of the safety deposit boxes. On September 10, 1947, following a notice to the interested parties, Laurence Cames, a representative of the Treasurer of the City and County of San Francisco, opened, personally examined and inventoried the contents of the safety deposit boxes of James Irvine. He also opened and examined, but he did not inventory, the contents of the safety deposit box of The Irvine Company. There were present at the opening and examination of the safety deposit boxes Chaffee Hall, attorney for Robert H. Gerdes and Myford Irvine who had been named as Executors in the will of James Irvine, Myford Irvine, Edna M. Price, and Charles S. Wheeler, Jr., as attorney for Kathryn Irvine who had been named as Executrix in the will of James Irvine. Chaffee Hall testified at the trial. Laurence Cames, who opened, examined and inventoried the contents of the safety deposit boxes of James Irvine, died in 1953. There was on file in the office of the Treasurer of the City and County of San Francisco the original inventory of those contents made by Laurence Cames which was in evidence. That inventory does not list the 510 shares of stock of The Irvine Company in question. That inventory does not list the indenture of trust as being among the contents of the James Irvine safety deposit

boxes. There are listed the 12,750 shares of stock of The Moraga Company which had been withdrawn from the Foundation by James Irvine in his letter of June 20, 1964, heretofore set out.

Chaffee Hall, who was present at the opening of the safety deposit boxes of James Irvine, testified that the certificates for the 510 shares of Irvine stock were not in any of those boxes.

Laurence Cames examined the contents of safety deposit box No. 3867 of The Irvine Company. He did not list any property of James Irvine as being contained in that box.

In the minutes of the meeting of the members of the Foundation held on May 25, 1937, acknowledgment is made of the receipt by the Foundation of the certificates for 505 shares of Irvine stock.

At the end of the letter of James Irvine dated June 20, 1946, acknowledgment is made of the receipt by the Foundation of the certificates for five shares of Irvine stock described in the letter. In the letter itself James Irvine states that he is handing the Foundation the certificates endorsed in blank.

Robert H. Gerdes is an attorney. He drafted the will of James Irvine dated November 14, 1946. In connection therewith James Irvine told him that he had endorsed the certificates of stock of The Irvine Company in question in blank and had delivered then to the Foundation. Following the death of James Irvine the certificates of stock in question were produced for transfer to the Foundation by Miss Price, the Secretary of the Foundation.

It was heretofore noted that the original indenture of trust was not listed as being in the safety deposit boxes of James Irvine.

George L. Beaubien gave testimony by way of deposition. He was the personal bookkeeper and accountant for James Irvine from 1917 until his death in 1947. He took care of the personal business papers, books and records of James Irvine. He testified that James Irvine never kept any certificates of stock or other securities in the safe at his office and that all such items were kept in his safety deposit boxes. He further testified, in substance, that he had not seen the indenture of trust during his period of service with James Irvine.

On September 19, 1947, the original indenture was produced at a special meeting of the Board of Directors of the Foundation and was read by the Secretary to the assembled Directors.

The plaintiff calls particular attention to certain documentary evidence and certain testimony which she contends negates the contentions of the defendants as to the possession of the stock. That will be next referred to.

On February 9, 1949, the Executors filed a Federal Estate Tax Return for the estate of James Irvine. It was signed by Katharine Irvine, Myford Irvine and Robert H. Gerdes as Executors. In that part of the return entitled "General Information" the following appears: "If the decedent had a safe deposit box at the time of his death indicate under what schedules in this return the contents are listed Schedules B, C, and D." In Schedule B there are 78 items listing shares of stock. Item 78 is as

follows: "78 510 shares The Irvine Company at $11,000 per share [8]5,610,000.00"

Note 8 is as follows:

> "[8]These shares, prior to death, were transfered [*sic*] by decedent to a charitable corporation under the terms of a revocable trust. (See Item 1 of Schedule N.) Since the amount of the value of said shares is deductible under Schedule N from the value of the gross estate, said shares have not been formally appraised * * *."

Under Schedule N the following appears:

"CHARITABLE, PUBLIC, AND SIMILAR GIFTS AND BEQUESTS

Transfers for Charitable Purposes:

Amount

"1. To the James Irvine Foundation, Crocker Building, San Francisco, California.

"(a) By revocable Indenture of Trust, dated February 24, 1937, decedent transferred and assigned to The James Irvine Foundation, a California corporation, trustee, (a) 505 shares of the capital stock of The Irvine Company, a West Virginia corporation; (b) all interest of decedent in the 200 shares of said The Irvine Company held in trust under the indenture of trust dated May 21, 1921, between decedent and James Irvine, Jr.;

Amount

(See Section 6 of this schedule); and (c) 12,750 shares of The Moraga Company, a California corporation. Under the terms of said indenture, it is provided that decedent may add securities and other property to the trust and may also withdraw securities and other property from the trust; that decedent may amend the trust; that decedent during his life shall receive all dividends and other earnings of the trust estate and shall vote all shares of stock; that decedent is to pay all taxes and other expenses incident to the trust property; that after the death of decedent, the trustee shall apply the income of the trust estate to charitable purposes. A copy of said indenture is filed herewith, marked Exhibit N-1.

"(b) June 20, 1946, by letter, decedent added to the trust estate under the above trust 5 shares of The Irvine Company and withdrew therefrom said 12,750 shares of The Moraga Company. A copy of said letter, with the receipt of said The James Irvine Foundation appended, is filed herewith marked Exhibit N-2.

"The James Irvine Foundation, a California corporation, is a corporation organized and operated exclusively for charitable purposes, no part of the earn-

Amount

ings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. Filed herewith as Exhibit N-3 is a copy of the Articles of Incorporation of The James Irvine Foundation, and as Exhibit N-4 is a copy of a letter from the Commissioner of Internal Revenue dated November 9, 1939, as to the tax status of The Irvine Foundation.

"At decedent's death the net assets of said trust consisted of 510 shares of The Irvine Company. For the purpose of this Schedule N, the value of said shares is stated at the same amount as stated in Schedule B $5,610,000.00

"* * *."

The Internal Revenue Service raised no question as to excludability of the 510 shares of Irvine stock from the gross estate for estate tax purposes.

Robert H. Gerdes was one of the three Executors of the estate of James Irvine. He, along with the other two Executors, signed the Federal Estate Tax Return above referred to. The other Executors died some time ago. His deposition was taken in December, 1966. He testified as a witness at the trial. On both occasions he was examined and cross-examined at length in regard to the listing in that return of the certificates for 510 shares

of Irvine stock in the schedule relating to items in the safety deposit box of James Irvine at the time of his death. In his deposition he first testified that it was his recollection that those certificate were contained in safety deposit box of James Irvine at the time of his death. Later in his deposition and at the trial he qualified his testimony as to that matter. He testified that at the time of the death of James Irvine he did not know the location of the certificates of stock; that he was not present at the opening of the safety deposit boxes of James Irvine and he would stand on the inventory of the contents of those boxes as made by a representative of the Treasurer of the City and County of San Francisco at the time they were opened.

The federal and state income tax returns of The Irvine Company commencing with the fiscal year of 1937 and ending with the fiscal year of 1948 were in evidence. In all of those forms there is a schedule entitled "Compensation of Officers." In the state form it appears as Schedule G. In the federal form it appears as Schedule F. In the schedules for those years it was reported that James Irvine was President of The Irvine Company; that he devoted three-fourths of his time to his duties as President of the company; that he received a specified compensation as President; and that he owned 547 shares of the common stock of the company. The 547 shares of stock necessarily included the 510 shares of Irvine stock covered by the indenture of trust.

In the minutes of the annual meetings of the stockholders of The Irvine Company during the years 1937 through 1946, reference is made in a column entitled

"Present" to the shares of stock represented either in person or by proxy. In that column in a number of the minutes the following appears: "James Irvine—549 shares." In that column in a number of other minutes the following appears: "Hellis voted proxy for Irvine Sr. owner and holder of 549 shares." These latter notations were made at meetings at which James Irvine was not present. The 549 shares referred to necessarily included the 510 shares included under the indenture of trust.

It was heretofore noted that on April 21, 1941, certificates of stock Nod. 33 and 42 for 132 shares and 41 shares described in the indenture of trust were surrendered to The Irvine Company and new certificates of stock issued in lieu thereof, which new certificates were endorsed in blank by James Irvine. The plaintiff asserts that it may be inferred from that occurrence that James Irvine at the time of the surrender and prior thereto had been in possession of all the certificates of stock described in the indenture of trust.

The plaintiff asserts that, considering the matters to which she specifically calls attention and considering the totality of the facts and circumstances shown by the entire record, it must be inferred that James Irvine never delivered the indenture of trust or the certificates for 510 shares of Irvine stock to the Foundation during his lifetime and that he at all times had those certificates in his possession and control. The defendants assert that the conclusions sought to be drawn by the plaintiff are based upon conjecture and speculation and are lacking in adequate evidentiary support. The defendants make

certain contentions as to certain evidence referred to by the plaintiff. The defendants assert that the conclusion sought to be drawn by the plaintiff from the listing of the 510 shares of Irvine stock in the Federal Estate Tax Return relating to the property of the decedent found in his safety deposit boxes at the time of his death is negatived not only by the explanatory note made in connection therewith but also by the official inventory of the safety deposit boxes made by the representative of the Treasurer of the City and County of San Francisco.

The defendants assert that the information contained in Schedules F and G of the federal and state income tax returns as to James Irvine's ownership of The Irvine Company stock in question does not constitute adequate support for the conclusion that he was in possession of the certificates. They assert that the income tax authorities desire the information requested in Schedules F and G for the purpose of passing upon the question as to whether the salaries of the officers of a corporation are reasonable so far as deductions are concerned and that the voting power or control of a corporation by a particular officer is an important consideration in that connection. James Irvine did retain the right to vote the stock in question during his lifetime and to receive the dividends thereon during his lifetime. Therefore, the defendants assert, and correctly so, that, for the purpose of control of the corporation in connection with salaries voted the officers and all other income tax purposes, James Irvine would be regarded by the Internal Revenue Service as the owner of the shares in question.

[1] It was noted that in the minutes of the annual meetings of the stockholders of The Irvine Company re-

ferred to that James Irvine was treated as being the ostensible owner of the 510 shares of stock. While those shares had been endorsed in blank, they had not been transferred on the stock record book of the company. Therefore, of record James Irvine was the only person entitled to vote those shares. He reserved that right in the indenture of trust. He could not have voted them if they had been transferred. Therefore, so far as The Irvine Company was concerned, he was the owner of them for corporate voting purposes. The defendants contend, and correctly so, that under the applicable law as between James Irvine and the Foundation the fact that the shares had not been transferred on the stock record book of the company was not determinative as to their respective interests thereon. See Hausfelder v. Security-First National Bank (1946), 77 Cal.App.2d 478, 176 P.2d 84.

In connection with the surrender of the certificates of stock and the issuance of new certificates of stock referred to by the plaintiff, the defendants assert, and correctly so, that the record is silent as to facts and circumstances surrounded the surrender of the certificates and the issuance of the new certificates. The record does show that the newly issued certificates were endorsed in blank by James Irvine.

[2] The first issue for determination is the issue as to the delivery of the indenture. The signed acceptance of the Foundation of the trusteeship established by the indenture appears on the indenture. The indenture was not found in the safety deposit boxes of James Irvine following his death. There is lacking any evidence show-

ing possession of the indenture by James Irvine following its execution. The only possession of it following its execution, as shown by the evidence, was the possession of the Foundation shortly following his death.

In connection with the matter of the delivery of the indenture, the defendants cite the case of Hall v. Hall (1948), 203 Ga. 656, 47 S.E.2d 806. In that case the Court stated (p. 810):

> " 'Where, at the request of a grantor, a person named as trustee in a deed which creates a trust enters his acceptance of the trust created upon such deed, such acceptance presumes conclusively a delivery of such deed by the grantor to the trustee.' New South Building & Loan Association v. Gann, 101 Ga. 678(2), 29 S.E. 15."

In the same connection they also cite the case of Jackson v. Pillsbury (Sup.Ct.Ill. 1942), 380 Ill. 554, 44 N.E.2d 537. In that case one Price executed a trust agreement. The trustee executed an acceptance of the trust. Following the death of Price, the administrator of his estate and certain of his heirs at law brought an action to have the trust agreement declared void. The validity of the trust was upheld. In that case the court stated (p. 548 of 44 N.E.2d):

> "Plaintiffs also insist that the trust agreement of September 8, 1933, was never delivered during Price's lifetime. * * * Manual delivery is unnecessary. Crow v. Crow, 348 Ill. 241, 180 N.E. 877. Where a binding agreement is signed by the parties, as in the present case, it is of but little

legal significance. Here, defendant [trustee] had accepted in writing the terms and provisions of the deeds made to him as trustee. This was a sufficient delivery. * * *"

The Court is of the view that the plaintiff has failed to establish the nondelivery of the indenture of trust. The Court is of the further view that the evidence preponderates in favor of a finding that the indenture of trust was, following its execution, delivered to the Foundation by James Irvine and that it was thereafter retained by it. The Court makes that finding.

[3] The next issue for determination is the issue as to the delivery and possession of the certificates for the 510 shares of Irvine Stock. The Court is of the view that the plaintiff has failed to establish the nondelivery of the certificates for those shares of stock. The Court is of the further view that the evidence preponderates in favor of a finding that, following the execution of the indenture of trust dated February 24, 1937, and his letter of June 20, 1946, James Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and thereafter during the lifetime of James Irvine the Foundation had in its possession certificates for 510 shares of Irvine stock, or those issued in lieu thereof, endorsed in blank. The Court makes that finding.

The first phase of the attack by the plaintiff on the title to the shares of stock involved was based upon the claimed nondelivery of the indenture and the certificates for those shares of stock. The Court having found that the indenture and the certificates of stock were delivered

to the Foundation, there is left for consideration the other phase of the plaintiff's attack. That attack is based upon the provisions of the indenture of trust. The plaintiff asserts, and correctly so, that the fact the indenture and the certificates for the shares of stock involved had been delivered by James Irvine to the Foundation would not permit the defendants to prevail if the trust was an invalid trust. She contends that certain of the provisions of the indenture rendered the trust invalid. She contends that the indenture constituted a testamentary disposition of the shares of stock involved. The plaintiff asserts, and correctly so, that the indenture was not executed in accordance with the laws of the State of California relating to wills. She further contends that the indenture constituted a mere agency as to those shares which agency was revoked by the death of James Irvine. The plaintiff asserts that the indenture of trust suspends the power of the alienation of the corpus of the trust in violation of the rule against perpetuities.

[4-7] The plaintiff contends, as just noted, that the trust is invalid under the rule against perpetuities. The indenture of trust suspends the power of alienation of the corpus of the trust in perpetuity. Section 9 of Article XX of the Constitution of California provides: "No perpetuities shall be allowed except for eleemosynary purposes." It is the well-established California rule that trusts for charitable uses and purposes are eleemosynary in purpose and hence without the scope of the rule against perpetuities. It is the contention of the plaintiff that certain provisions of the indenture of trust deprive it of the status of a trust for charitable uses and purposes under the rule referred to. Her contention has two phases.

She asserts that the indenture of trust contains both noncharitable and charitable provisions which are so inseparably blended together as to deny the trust the status of a trust for charitable uses and purposes. Under the California law a trust the funds of which are authorized to be used for both charitable and noncharitable purposes falls foul of the rule against perpetuities. In re Sutro's Estate (Sup.Ct.Cal. 1909), 155 Cal. 727, 102 P. 920; In re Kline's Estate (Cal.App. 1934), 138 Cal. App. 514, 32 P.2d 677. Under the California law a trust which would permit the trustee to devote the funds of a trust to a noncharitable purpose also falls foul of that rule. In re Peabody's Estate (Cal.App. 1937), 21 Cal.App.2d 690, 70 P.2d 249. The plaintiff asserts that the trust does not have the status of a trust for charitable uses and purposes because of a provision in the indenture of trust excluding tax supported charities from support by the trust. This latter ground of attack will be first considered. In paragraph 3 of the indenture it is provided that the income of the trust "shall be used, applied and devoted by the Trustee exclusively to or for the advancement of any charitable use of purpose in the State of California." In the last paragraph of the indenture it is stated:

> "It is also the direction of the Trustor that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the property derived from this trust, but that all such property, available from time to time for the benefit of charities, shall be used for such charities as do not enjoy any substantial support through taxation."

It is the theory of the plaintiff that the direction for the excluding from the beneficiaries of the trust of tax supported charities has the effect of denying the trust the status of a valid trust for charitable uses and purposes and hence falls foul of the rule against perpetuities.

It appears from the records of the Foundation over the years which were introduced into evidence that there is no lack of California nontax supported organizations to whom the Foundation may properly make gifts. The records of the Foundation which are in evidence show a distribution of millions of dollars to innumerable California organizations.

The plaintiff has cited no authority in support of her contention that exclusion of tax supported charities from the beneficiaries of a trust renders the trust a noncharitable trust. It would seem that it was the view of the trustor that nontax supported charities were more needful of support than were tax supported charities.

It is the view and holding of the Court that the direction in the indenture of trust as to the exclusion of assistance to tax supported charities does not have the effect of denying the trust the status of a trust for charitable uses and purposes under the rule referred to.

The second phase of this attack on the validity of the trust under the rule referred to is based upon paragraph 2 of the indenture. In the paragraph preceding paragraph 2 provision is made for deductions from the income of the corpus of the trust for administrative expenses and to make good or replace losses suffered in the corpus of the trust. Paragraph 2 then provides as follows:

"2. Out of the balance of said income, after the deductions hereinabove provided, the Trustee may, and in the judgment of the Trustor should, each year set aside such sum as the Board of Directors of the Trustee shall in its sound discretion deem wise and expedient for investment, and said Trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investments, when made, shall become a part of the corpus or principal of the trust property, and the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided."

It is the theory of the plaintiff that under paragraph 2 the Board of Directors of the Foundation may in their uncontrolled discretion continually invest all of the income from the corpus of the trust and hence freeze all such income into the corpus of the trust and hence negate the use of income for charitable uses and purposes.

[8-11] Under the California law gifts to charity are highly favored and trusts intended for charity are highly favored in the law and transfers in trust intended for charity must be liberally construed to uphold their validity whenever possible. Dingwell v. Seymour (Cal. App. 1928), 91 Cal.App. 483, 267 P. 327. In that case the Court stated (pp. 507-508 of 91 Cal.App., p. 337 of 267 P.):

"[A] few quotations from leading cases and authorities on the attitude of courts toward charitable trusts are pertinent, since they have a direct bearing on the laws of construction: 'Charitable trusts

> are the favorites of equity; they are construed as valid whenever possible, by applying the most liberal rules of which the nature of the case admits, and are often upheld where private trusts would fail.' 11 C.J. 307. * * *"

Where a trust is established with a charitable corporation as trustee, the provisions in its articles of incorporation may be applied along with the provisions of the trust instrument to limit the trust to solely charitable purposes. Brown v. Memorial Nat. Home Foundation (Cal.App. 1958), 162 Cal.App.2d 513, 329 P.2d 118, 75 A.L.R. 2d 427. In that case the Court stated (pp. 520-521 of 162 Cal.App., p. 122 of 329 P.2d):

> "Where a corporation becomes trustee of a benevolent trust the courts look first to its charter to determine the nature and extent of the dedication of its assets to eleemosynary purposes. * * *"

In the indenture of trust it is stated that the purpose and object of the trust is to assist California charities. The same purpose and object is stated in the articles of incorporation of the Foundation. The incorporation of the Foundation and the execution of the indenture of trust with the Foundation as trustee are closely related. The manifest objective of James Irvine in incorporating the Foundation and in executing the indenture of trust was to make it possible for a substantial part of his property to be devoted to the assistance of California charities.

Section 10207 of the California Corporations Code relating to nonprofit corporations provides as follows:

"§ 10207. Examination by Attorney General: Institution of proceedings: Restriction on accumulation of income. Each such corporation shall be subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purpose for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure. Except as specially approved by the Attorney General such a corporation shall not accumulate income for a period longer than five years."

Section 9505 of the California Corporations Code provides as follows:

"§ 9505. Supervision by Attorney General where property held in trust: Institution of proceedings. A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure."

California has enacted the Uniform Supervision of Trustees For Charitable Purposes Act, Secs. 12580-12595 inclusive, California Government Code. Under that Act the Attorney General is charged with the supervision of charitable corporations and trustees holding property for charitable purposes. Under the statutory provisions referred to, the Attorney General can by court action prevent the trustee of a charitable trust from departing from the objects and purposes of the trust.

The Attorney General of California filed a brief herein. In connection with the contention of the plaintiff here under consideration, he stated:

> "Reading the trust instrument as a whole, as we are required to do, it is clear that it cannot reasonably be interpreted as creating a trust for the purpose merely of enlarging the trust corpus. Rather, its *purpose* is the distribution of funds for charity. This being so, the power of the trustee to apply income to investments is necessarily circumscribed thereby.
>
> "Powers of a trustee exist to carry out the trust objective. They may not be exercised independently and in opposition to the purpose of the trust. They are subordinate to the purpose of the trust and must be exercised in a manner that will further that purpose. * * *"

It would hardly seem that James Irvine, after going to the work and effort to set up the Foundation and making it the trustee under the indenture of trust for the clearly expressed purpose and objective of assisting California charities, either intended or contemplated that

under paragraph 2 in the indenture of trust the Directors of the Foundation could in their uncontrolled discretion defeat that purpose and objective by continually freezing all of the income into principal.

The plaintiff's construction of the indenture of trust would result in the destruction of the trust. The Attorney General's construction of the trusts would result in its being preserved for the purpose of assisting California charities. It is the view of the Court that the Attorney General's construction is the more natural and reasonable construction.

[12] It is the view and holding of the Court that the trust in question is a valid trust for charitable uses and purposes under the California law exempting such trusts from the rule against perpetuities.

[13] The plaintiff contends that the indenture of trust is invalid for another reason. Under the indenture of trust The James Irvine Foundation would and did become the owner of the majority of the shares of stock of The Irvine Company. That ownership carried with it control of that company, including its dividend policies. The plaintiff asserts that such control gives rise to a conflict of fiduciary duties in the matter of the use of the income of The Irvine Company for the private commercial use by that company of the use of the income by the Foundation for charitable purposes. In that connection the plaintiff stated in her brief: "This conflict of fiduciary duties between charitable uses and private use of the available trust fund is against public policy and render the indenture of trust void." All gifts or bequests to charitable corporations of the majority of the

stock of a private commercial corporation carry with it, as in the present case, the control of the latter corporation. Thus, it would seem that the plaintiff's contention encompasses the broad general question as to whether the ownership by a charitable corporation of the majority of the voting stock of a private commercial corporation is contrary to public policy.

Charitable corporations are usually incorporated under the laws of the different states. The matter of what powers such corporations may have and exercise and their regulation have heretofore been left to the states. Legislation by Congress as to such corporations has, in general, related only to the extent and character of the exemptions to be afforded them under the federal tax statutes. If Congress should deem it contrary to federal public policy for charitable corporations to have controlling interests in private commercial corporations, it could deny federal tax exemptions to gifts and bequests of such controlling interests and the income therefrom. So far Congress has not done so. The question as to whether Congress might legislate as to state incorporated charitable foundations under a constitutional power or constitutional powers other than the power of taxation is not involved because so far Congress has not done so. The California Legislature, if it deemed that gifts or bequests carrying with them the control of private commercial corporations are contrary to public policy, could under its power to regulate charitable corporations incorporated under the laws of California prohibit such corporations from receiving or retaining such gifts and bequests. So far the California Legislature has not done so. No California cases are cited which hold that

it is contrary to public policy for a California charitable corporation to own the controlling interest in a private commercial corporation.

It is the view and holding of the Court that the indenture of trust is not illegal as being contrary to public policy.

[14] The plaintiff makes certain other contentions. She contends that the indenture did not create a trust as to the 510 shares of Irvine stock but merely created an agency as to them which was revoked by his death. She also contends that the trust constituted an attempted testamentary disposition of those shares. The two contentions are closely related. In support of her contention as to testamentary disposition, the plaintiff cites and quotes from the case of Monell v. College of Physicians and Surgeons (1962), 198 Cal.App.2d 38, 17 Cal.Rptr. 744. In that case the Court stated (p. 751):

> "If, however, a trust is the instrumentality for making a testamentary disposition of property, the document creating the trust must comply with the requirements prescribed for the making of wills. (Rest. 2d Trusts, § 53.) In the comment to above section of the Restatement, it is stated: "A testamentary disposition of property is a disposition to take effect upon the death of the person making the disposition and as to which he has substantially entire control until his death. Such a disposition is testamentary whether made by a will or a document which purports to be a will or made by a transaction inter vivos, as by a deed, unsealed writing or parol declaration or transfer.' * * *"

In that case the Court quotes from 1 Scott on Trusts as follows:

> " 'If the transaction were one which would involve merely an agency but for the fact that the legal title is technically vested in the person entrusted with possession, it is clear that the disposition is testamentary.' "

The quotes above set forth are relied on by the plaintiff. In the same case the Court further stated (p. 752):

> "Where an interest in the trust property is created in the beneficiary during the lifetime of the settlor, such disposition is not testamentary 'merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.' (Rest.2d Trusts, § 57; Nichols v. Emery, supra, 109 Cal. 323, 331, 41 P. 1089.) The principles enunciated by the last section are coordinated with the principles of agency. * * *"

In the quotation just set out the Court cites in support of its statement the case of Nichols v. Emery (1895), 109 Cal. 323, 41 P. 1089. That case is a landmark case in this particular field which has since been followed by the California appellate courts. In that case one Nichols executed a deed of trust to certain land. In the deed of trust he retained the equivalent of a life estate in the land. In the deed of trust he reserved the power to revoke the trust. He died without having

exercised that power. Following his death one of his heirs at law contended that the land in question constituted a part of the assets of his estate. The Supreme Court of California held that it did not. In that case the Court stated (p. 1091 of 41 P.):

> "* * * But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives, or an intermediate estate. * * *"

The Court also stated (p. 1091 of 41 P.):

> "* * * In this case there remained in the grantor the equivalent of a life estate during his own life, and he was thus entitled to remain in possession of the land, or lease it and retain the profits. Nor did the fact that the settlor reserved the power to revoke the trust operate to destroy it, or change its character. He had the right to make the reservation. Civ. Code, § 2280. But the trust remained operative and absolute until the right was exercised in proper mode. * * * Indeed this power of reservation was strongly favored in the case of voluntary settlements at common law, and such a trust, without such a reservation, was open to suspicion of undue advantage taken of the settlor. * * *"

Under the indenture of trust in this case the trustor reserved the right to the dividends and other returns

from the Irvine stock during his lifetime. He also reserved the right to vote the stock during his lifetime. He also reserved the right to revoke the trust in whole or in part. The trustor agreed during his lifetime to "pay, when due, all taxes, assessments, insurance, liens, charges and/or expenses necessary or proper for the preservation, maintenance or care of the trust property." In the indenture of trust it is first stated:

> "That the trustor hereby transfers, assigns and conveys to the trustee, to have and to hold in trust, nevertheless and for the following trust uses and purposes, the following securities, to-wit:
>
> "— 505 —shares of the capital stock of The Irvine Company, a corporation organized and existing under the laws of the State of West Virginia, and evidenced by the following certificates for the following number of shares, to-wit: * * * ."

Then follow the certificate numbers of The Irvine Company stock and the certificate numbers of The Moraga Company stock. James Irvine revoked the indenture as to The Moraga Company shares at the same time he had added five more shares of The Irvine Company stock. He did not at any time revoke his transfer of The Irvine Company stock.

The plaintiff, in support of her contention that the indenture was testamentary in character, calls attention to certain provisions of the indenture. The indenture, following the trustor's reservation of the dividends from the stock during his lifetime, goes on to state "[A]fter the death of the Trustor" the trustee shall receive the dividends. The plaintiff also calls attention to para-

graph 5 of the indenture which refers to the death of the trustor. That paragraph is as follows:

> "5. The powers and discretions of the Trustee enumerated herein are not to be construed as a limitation upon its general powers and discretions, but the Trustee and the Board of Directors thereof, as the same may from time to time be constituted, in addition thereto is hereby vested with and shall have after the death of the Trustor and for the full duration of this trust thereafter, as to the trust property, the income therefrom and in the execution of this trust, the same powers and discretions that an absolute owner of property has or may have, subject to the provisions and conditions of this trust."

The plaintiff asserts that the connotation to be placed upon the words "[A]fter the death of the Trustor" contained in the indenture meant that no beneficial interest in the stock in praesenti was to pass to the Foundation until the death of the trustor.

In the case of Nichols v. Emery, supra, the Court, as heretofore noted, pointed out the distinction between the interest transferred and the enjoyment of the interest. The defendants herein assert that a transfer of a beneficial interest in the stock was made by the execution and delivery of the indenture and that the provisions in the indenture referred to by the plaintiff merely postponed the enjoyment of that interest until the death of the trustor. Under the rule of Nichols v. Emery, supra, neither the fact that the trustee had "complete dominion over the trustee." That observation lacked

evidentiary support. James Irvine, in connection with the incorporation of the Foundation, designated those who were to constitute its first Board of Directors. The Directors constituted all the members of the corporation. Under its articles of incorporation the Board of Directors selected their own successors in office, and hence the Board was self-perpetuating. James Irvine was at no time a member of the Board of Directors or an officer of the corporation. Two members of his family were on the first Board of Directors, but they constituted a minority of the Board. It was his expressed desire that the Foundation not be a family controlled Foundation. James Irvine reserved no power to designate the successors in office to the members of the first Board of Directors or to remove any Director from office. There is nothing in the articles of incorporation purporting to give James Irvine dominion over and control of the Foundation. The minutes of the Board of Directors and the minutes of the Foundation do not contain any reference to the presence of James Irvine at those meetings. However, it appears from the testimony that he did attend some of those meetings. The record is silent as to the extent of his participation in the discussion and deliberation at those meetings. It seems clear that James Irvine did not have dominion over and control of the Foundation, the trustee under the indenture of trust.

The contention of the plaintiff in regard to the matter of control is based, in part, on the control of James Irvine over The Irvine Company during his lifetime. In this connection in her brief it is stated:

> "Mr. [James] Irvine retained the full control over The Irvine Company, his alter ego, and all of its land holdings and other assets, and the absolute power to alienate the same * * *. Mr. [James] Irvine, with his absolute control of 100 per cent of the stock of The Irvine Company, his alter ego, had he so desired could have alienated or sold all of the assets of said Irvine Company at any time prior to his death."

It would seem that since James Irvine under his power of revocation contained in the indenture of trust could have withdrawn all the 510 shares from the Foundation, the fact he could have achieved what would be substantially the same result by alienating all the assets of The Irvine Company would not be of determinative legal significance.

The contention of the plaintiff as to the matter of agency is closely connected with the matter of testamentary disposition. If during his lifetime the relationship of James Irvine and the Foundation as to the shares was that of principal and agent, that relationship would, of course, have been terminated by his death. If the relationship was that of agency, then no valid trust was established as to the shares and James Irvine continued to be the owner of them for testamentary purposes; and the disposition by him under the indenture of trust would have been testamentary in character.

In the recent case of Dessar v. Bank of America National Trust & Savings Ass'n (1965), 353 F.2d 468, the United States Court of Appeals for this Circuit had before it the question as to whether the trust instrument

there under attack created a valid trust or a mere agency under the applicable California law. In that case the trust instrument recited that certain personal property had been assigned and transferred to the trustee. In the trust instrument the trustor reserved during her lifetime the right (a) to change or amend any of the provisions of the trust, (b) to increase or decrease the amount provided to be paid to any beneficiary, (c) to change the beneficiary or beneficiaries, (d) to revoke the trust in whole or in part, (e) to take out of the trust any part or all of the trust property, (f) to receive the income on the trust property, and (g) to direct the trustee with respect to the investment or other disposition of the trust property. The Court, after reviewing the California law on the subject, held that the trust instrument created a valid inter vivos trust and not a mere agency. The control retained by the trustor in the trust instrument in that case was as great if not greater than the control retained by the trustor in the present case.

It is the view and holding of the Court that the contention of the plaintiff that the relationship of the Foundation to the shares of stock here in question was that of a mere agent is not well founded.

It was heretofore determined by this Court that following the execution of the indenture of trust it was delivered to the Foundation. It is the contention of the defendants that if the indenture of trust was delivered it was not necessary under the California law that the certificates for the shares be delivered. In support of that contention they cite the following cases: Stone v. Greene (1919), 181 Cal. 569, 185 P. 670; Burkett v.

Doty (1917), 176 Cal. 89, 167 P. 518; and Driscoll v. Driscoll (1904), 143 Cal. 528, 77 P. 471.

In the case of Burkett v. Doty, supra, the Court stated (p. 93 of 176 Cal., p. 520 of 167 P.):

> "It must be remembered that, as between donor and donee, it is not necessary to the validity of a gift *inter vivos,* if made by a written instrument transferring the title to the donee, that the possession of the thing given [notes] be passed to the donee. * *"

In the case of Driscoll v. Driscoll, supra, the Court stated (pp. 535-536 of 143 Cal., p. 474 of 77 P.):

> "There is no statutory requirement in this state that a gift which is effected by an executed grant shall be accompanied by a delivery of the property given, and, as between the parties to the transaction, there is no violation of law, or infringement of public policy, if the donor, after he has executed the instrument of gift, shall retain possession of the property. * * *"

In connection with the matter of the transfers of corporate stock, the defendants cite, among other cases, the following: Francoeur v. Beatty (1915), 170 Cal. 740, 151 P. 123; Pollard v. Pollard (1959), 166 Cal. App.2d 698, 333 P.2d 356; Crocker v. Crocker (1927), 84 Cal.App. 114, 257 P. 611; Young v. New Pedrara Onyx Co. (1920), 48 Cal.App. 1, 192 P. 55.

In the case of Pollard v. Pollard, supra, it was held that a written assignment was sufficient to effect a valid transfer of stock in trust. In Bogert, Trusts and Trustees

(2d edition 1965), Sec. 148, p. 54, n. 79, the *Pollard* case is cited in support of the following rule:

> "A trust may be held created where there has been a delivery to the trustee of the instrument of transfer, even though documents representing property transferred were not handed to the trustee."

In the case of Francoeur v. Beatty, supra, the Court held that an executed written instrument was sufficient to effect an inter vivos transfer of stocks and bonds even though it was not accompanied by delivery of the securities. In that case the Court stated (p. 745 of 170 Cal., p. 125 of 151 P.):

> "The gift was fully and effectually made to defendant when the written instrument in his favor was executed. It was not rendered executory because accompanied by no actual delivery to defendant of the property given, nor did the mere retention itself of the property by Mrs. Hitchcock [the donor] at all affect its validity as a perfect gift. * * *"

[16] In the present case in the indenture of February 24, 1937, the trustor states that he "hereby transfers, assigns and conveys to the trustee" the 505 shares of stock described therein. The situation is the same as to the five shares of stock. It seems clear that under the California law the indenture upon its execution and delivery transferred to the Foundation a beneficial interest in praesenti in the shares of stock, subject only to being divested by the exercise by James Irvine of his power of revocation.

[17] It was heretofore determined by this Court that James Irvine endorsed the certificates for the

shares of stock in blank and delivered them to the Foundation. It is the well-established California law that the delivery of an endorsed certificate of stock is sufficient to effect a valid transfer of the shares of stock represented by the certificate. Oakland Scavenger Co. v. Gandi (1942), 51 Cal.App.2d 69, 124 P.2d 143; Hynes v. White (1920), 47 Cal.App. 549, 190 P. 836; Coward v. De Cray (1918), 38 Cal.App. 290, 176 P. 56.

[18] It seems clear that under the California law the endorsement by James Irvine of the certificates for the shares of stock and the delivery by him of those certificates to the Foundation transferred a beneficial interest in praesenti in those shares of stock to it, subject only to being divested by the exercise by James Irvine of his power of revocation.

It is the view of this Court that none of the contentions of the plaintiff are well founded.

It is the holding of this Court that on the merits the plaintiff is not entitled to the relief sought by her herein.

In view of the denial of the plaintiff's claim on the merits, it is not necessary to consider the issues as to laches, statute of limitations, res adjudicata and estoppel.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties to this action and the subject matter of this action.

2. Under the indenture of trust dated February 24, 1937, a valid trust for charitable purposes was established.

3. The James Irvine Foundation as trustee of that trust has valid title to 459 shares of stock of The Irvine Company.

4. None of the heirs at law of James Irvine and none of the beneficiaries under his will have any right or title to, or any interest in, those shares.

ORDER FOR JUDGMENT

It is hereby ordered that judgment shall be entered:

1. Adjudging that the indenture of trust dated February 24, 1937, established a valid trust for charitable purposes.

2. Adjudging that The James Irvine Foundation as trustee of that trust has valid title to 459 shares of stock of The Irvine Company.

3. Adjudging that none of the heirs at law of James Irvine and none of the beneficiaries under his will have any right or title to, or any interest in, those shares.

4. Dismissing the plaintiff's amended complaint with prejudice and rendering final judgment herein in favor of the defendants.

5. Assessing the taxable costs of this action against the plaintiff.

The foregoing constitutes the Findings of Fact, Conclusions of Law, and Order for Judgment herein.

APPENDIX C

Rule 19.

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus re-

garded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX D

In the case of *Hoe v. Wilson*, the Supreme Court in 1870 ruled that a court must sua sponte invoke the indispensable party issue even though it was not raised by a party, and the court said, at page 504, 9 Wall 501:

> "No relief can be given in the case before us which will not seriously and permanently affect their rights and interest. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, sua sponte have caused the bill to be properly amended, or have dismissed it if the amendment were not made."

Section 516 of Volume 2, Barron & Holtzoff, Federal Practice and Procedure states as follows:

> "§ 516. Effect of Failure to Join; Jurisdiction as Affected by Joinder.
>
> In considering what action an appellate court should take when it is urged to vacate the proceedings below and to dismiss for want of an indispensable party, three situations must be distinguished. (1) The judgment purports to affect prejudicially the interest of an absent indispensable party, and the objection is raised for the first time on appeal. * * *
>
> "In situation (1) the action must be dismissed, or remanded to bring in the absent parties. This is the classic illustration of the rule that the objection of

failure to join an indispensable party may be raised for the first time on appeal." 34.1a * * *

(The footnote 34.1a reads as follows: "This was the situation in the leading case of *Hoe v. Wilson,* 1870, 76 U.S. (9 Wall.) 501, 19 L.Ed 762. See also *McShan v. Sherrill,* C.A. 9th, 1960, 283 F.2d 462)".

"The results in these situations must be considered in terms of the purposes of the compulsory joinder rule. That rule is intended to protect the absentee from prejudice. * * * For the first of these purposes, timely objection of the parties is immaterial. If the absentee will otherwise suffer prejudice, the court must act on its own to protect him, and this is why the appellate court must reverse in situation (1)."

APPENDIX E

CALIFORNIA AUTHORITIES APPLICABLE TO STATUS OF JAMES MYFORD IRVINE AS HEIR AT LAW OF JAMES IRVINE, DECEASED

In this action, the petitioner contends that James Irvine died intestate as to the 510 shares of Irvine stock. Section 250 of the Probate Code of California defines the inheritance rights of the minor, James Myford Irvine, as an heir and descendant of his grandfather, James Irvine, deceased, as follows:

Section 250.

> "Inheritance or succession 'by right of representation' takes place when the descendants of a deceased person take the same share or right in the estate of another that such deceased person would have taken as an heir if living . . . "

It is clear that the lineal descendant of a predeceased ancestor is the heir and takes directly from the decedent. In Estate of Meyer, (1951), 107 Cal.App.2d 799, 810, where the court was called upon to define the nature of the interest which an heir succeeded to in an intestate estate, it is stated: (Emphasis added).

> ". . . *The estate vests in the heir, do instanti upon the death of the ancestor;* and no act of his is required to perfect title. The estate is cast on the heir by operation of law without regard to his wishes or election. No assent or acceptance is necessary. He cannot, by any act, cause the estate to remain in his ancestor for the latter is incapable of holding it after his death . . ." (Emphasis added).

In *Maud v. Catherwood* (1945), 67 Cal.App.2d 636, 155 P.2d 111, which was an action for partition of real property and involved the question of whether certain heirs took per capita or by right of representation, the court states at page 644:

> "Succession by right of representation as used in Section 250 [Probate Code] means a *substitution* of one or more for another in uninterrupted sequence. Once it is determined that descendants are not of equal degree it is necessary to determine the amount each is entitled per stirpes." (Emphasis added).

Estate of Healy (1917), 176 Cal. 244, 246, 163 P. 124 "by right of representation" as that:

> ". . . which occurs when the descendants of a deceased heir take together the same share of the estate of another person that the parents would have taken if living."

In the case of *Estate of Berk*, which involved California Probate Code, Section 250, and is reported at 196 Cal.App.2d 278, 16 Cal.Rptr. 492, the District Court of Appeals of California makes the following pertinent statement:

> "A dead man can neither get nor give; he can neither inherit nor transmit. The distributee by right of representation does not receive by transmission from his immediate ancestor. * * * * * * It follows that the representative is not by the mere fact of representation rendered personally liable for the debts of the person he represents. The statute

> gives him a share of the latter but does not burden him with the obligations of the latter. While David inherited the share of the estate his father would have taken had he been living; he inherits not from his father but directly from Samuel."

Samuel was a brother of David's father. See also *Lombardi v. Blois,* 230 Cal.App.2d 191 40 Cal.Rptr. 899.

APPENDIX F

DECISIONS OF THE COURT OF APPEALS INCLUDING THE NINTH CIRCUIT COURT OF APPEALS WITH WHICH THE DECISION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS

Wesson, et al. v. Crane, 8th Circuit, 165 F.2d 6;

Stevens v. Loomis, 1st Circuit, 334 F.2d 775;

Cummings v. Redeeriaktieb Transatlantic, 3rd Circuit, 242 F.2d 275;

Haby v. Stonolind, 5th Circuit, 225 F.2d 723.

Said Order denying petitioner's Petition for Rehearing is also in conflict with the following cases of the Court of Appeals for the Ninth Circuit, to wit:

McShan v. Sherrill, 238 F.2d 462;

The Dredge Corporation v. Penney, 338 F.2d 456;

State of Washington v. United States, 87 F.2d 421.

APPENDIX G

DECISION OF THE SUPREME COURT OF CALIFORNIA WITH WHICH THE DECISION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS

Both of the courts below in their respective opinions stated that it is undisputed that the law of California applies to this action.

As early as 1887, the Supreme Court of California in the case of *O'Connor v. Irvine, et al.*, 74 C. 435, 16 Pacific Rptr. 236, established the law in California which is applicable to the mandatory requirement that all indispensable parties to an action such as the petitioner's action in the instant case must be joined and that the court shall not proceed in their absence as follows:

> In the absence of Selover as a party, a complete determination of the controversy, we think, cannot be had without prejudice to his, Selover's rights. The decree, if enforced, might result in a sale to innocent purchasers of Selover's interest, and, as was said in *Reyes v. Sanford,* 5 Cal. 116, "would have no other effect than to renew litigation by producing more suits in order to settle and determine finally the rights of all parties." A court of equity will not permit litigation by piecemeal. The whole subject-matter and all the parties should be before it, and their respective claims determined once and forever. Generally, in suits between *cestuis que trust* and trustees, all the parties interested should be before the court. Barb. Parties, 439, 442, 444. If the necessary parties to a full determination are not before the court it is the duty of the

court on its own motion to order them brought in; and this, although the defendants in the action have omitted to raise an objection of defect of parties by demurrer or answer. The failure of the court so to do is fatal to the judgment. *Osterhoudt v. Board Sup'rs,* 98 N. Y. 239; *Settembre v. Putnam,* 30 Cal. 498; *Gates v. Lane,* 44 Cal. 396; Barb. Parties, 319.

Selover is a party primarily interested in the stock disposed of by the judgment before us. The amount of his interest therein is not shown. Necessarily, therefore, he would be prejudiced by the execution of this judgment, and must be made a party in order that a complete determination of the controversy may be had. We see no way to avoid a new trial in order to determine the controversy finally and without prejudice to the rights of Selover.

Judgment and order reversed, and cause remanded for further proceedings in accordance with the views herein expressed, and for a new trial.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; THORNTON, J.

Other California cases which are in agreement with the foregoing statement from the case of *O'Connor v. Irvine* and which were cited and quoted from in the Petition for Rehearing and which are also in agreement with the decisions of the United States Supreme Court herein referred to are: *"Bank of California v. Superior Court,* 16 C. 2d 510, 190 P. 879 (Supreme Court); *Hartman Ranch Co. v. Associated Oil Co.,* 10 C. 1032; 73 P.2d 1163. (Supreme Court)."

APPENDIX H

Basket v. Hassell, 107 U. S. 602 (2 Sup.Ct. 415)

* * *

"The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to devest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos,* but upon the recognized conditions subsequent, in case of a gift *mortis causa;* and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: *Powell v. Hellicar,* 26 Beav., 261; *Reddel v. Dobree,* 10 Sim., 244; *Farquharson v. Cave,* 2 Colly. Ch., 356; *Hatch v. Atkinson,* 56 Me., 324; *Bunn v. Markham,* 7 Taunt., 224; *Coleman v. Parker,* 114 Mass., 30; *Wing v. Merchant,* 57 Me., 383; *McWillie v. Van Vacter,* 35 Miss., 428; *Egerton v. Egerton,* 17 N. J. Eq., 420; *Michener v. Dale,* 23 Pa., 59.

Monnell v. College of Physicians and Surgeons, 198 C.A.2d 38 17 Cal. Rptr. 744"

* * * *

"[12] If, however, a trust is the instrumentality for making a testamentary disposition of property, the document creating the trust must comply with the requirements prescribed for the making of wills. (Rest. 2d Trusts, § 53.) In the comment to above section of the Restatement, it is stated: "A testamentary disposition of property is a disposition to take effect upon the death of the person making the disposition and as to which he has substantially entire control until his death. Such a disposition is testamentary whether made by a will or a document which purports to be a will or made by a transaction inter vivos, as by a deed, unsealed writing or parol declaration or transfer." (P. 130; see also 1 Scott on Trusts, § 53, p. 361.)

[13, 14] Section 56 of the Restatement Second of Trusts declares:

"Where no interest in the trust property is created in a beneficiary other than the settlor before the death of the settlor, the disposition is testamentary and is invalid unless the requirements of the Statute of Wills are complied with." Under the foregoing rule the beneficiary may fail to acquire any interest during the settlor's lifetime, either because the settlor fails to make an effective conveyance to the trustee during such time or because there was no effective disposition of the beneficial interest prior to the settlor's death according to the intention of the settlor. (Estate of Alberts, supra, 38 Cal.

App.2d 42, 100 P.2d 538; 1 Scott on Trusts, § 56, p. 422; Rest. 2d Trusts, § 56, Comment a.) If, on the other hand, during the lifetime of the settlor, the beneficiary acquires an interest by a final and definitive disposition, such disposition is not testamentary merely because the enjoyment of the beneficial interest is postponed until the trustor's death. (1 Scott on Trusts, § 56.5, p. 431.) But "if the owner of property delivers it or delivers a deed of conveyance to the intended trustee, but he manifests an intention that the conveyance shall not be effective until his death, the disposition is testamentary." (Rest. 2d Trusts, § 56, Comment b.)

[15, 16] Where an interest in the trust property is created in the beneficiary during the lifetime of the settlor, such disposition is not testamentary "merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust." (Rest.2d Trusts, § 57; Nichols v. Emery, supra, 109 Cal. 323, 331, 41 P. 1089.) The principles enunciated by the last section are coordinated with the principles of agency. In effect, the section states that the *mere fact* of the reservation of the above powers will not transform the *trustee* into an *agent*. But, on the other hand, it will not make every agent a trustee within the scope of the principles governing trusts."

* * * *

"We believe that the evidence disclosed by the record is sufficient to support the trial court's conclusion that the attempted disposition was testamentary in character

and not complying with the requirements for the execution of wills was therefore invalid."

* * * *

"Considered from another point of view, it was reasonable for the trial court to determine against the existence of a trust because the evidence warranting any such inference was not full, clear and convincing."

* * * *

"The trial court's conclusion thus withstands the attack of appellant's citations."

* * * *

"Appellant contends that in section 57 of the Restatement Second of Trusts is found the touchstone of the problem. As we have shown heretofore, this section applies when an interest *has* been created in a beneficiary other than the settlor, and declares that the disposition is not testamentary merely because a power to revoke is reserved. *It does not extend its protective influence to agency or informal trust transactions where it has been determined that no interest has been effectively created in the beneficiary before the settlor's death.* Emphasis added."

Lawson v. Lowengart, 251 A.C.A. 98 59 Cal.Rptr. 186

* * * * *

"[9] Usually, the manifestation of the settlor's intent that the trust take effect immediately is evidenced by his delivery to the trustees of the subject matter of the trust or some act or an instrument indicating the settlor's re-

linquishment of dominion over the property. Where the means chosen is an instrument of transfer, the instrument must meet the requirements for a conveyance of the particular kind of property involved (Bogert, Trusts & Trustees, 2d ed., §§ 141, 142, pp. 4-9; § 147, p. 49; 1 Scott on Trusts, 2d ed., § 32.2, p. 251).

[10] Here, the agency account securities in the possession of the bank were never endorsed nor, in fact, delivered and the bank never received any properly authorized stock options or instruments from Dr. Maxwell to transfer the securities to the trustees prior to her death. Nor, as in Thomas v. Lamb, 11 Cal.App. 717, 106 P. 254, and Logan v. Ryan, 68 Cal.App. 448, 229 P. 993, was there any act by which Dr. Maxwell surrendered to the trustees complete control and dominion over the property that was the subject of the gift in trust. Defendants, as the parties holding the affirmative and asserting the sufficiency of the gift in trust, had the burden of proving valid delivery to the trustees (Code Civ.Proc., § 1981; Blonde v. Estate of Jenkins, 131 Cal.App.2d 682, 686, 281 P.2d 14).

[11-13] The actual or symbolic delivery of the securities was essential to complete the inter vivos trust. A delivery by instrument must have the intended effect of divesting the donor of all present control and vesting the trustees with an equitable present right to reduce the fund into possession (Beebe v. Coffin, 153 Cal. 174, 177-178, 94 P. 766). A delivery may be symbolic, such as delivery of a written instrument, without physical delivery of the securities themselves, so long as the instrument

is one upon which delivery of the trust corpus might be compelled (Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947; Edwards v. Guaranty Trust etc. Bank, 47 Cal.App. 86, 89, 190 P. 57).

[14, 15] The mere signing of the instrument by Dr. Maxwell did not constitute delivery nor create a presumption thereof (Boyd v. Slayback, 63 Cal. 493; Miller v. Jansen, supra). As to Dr. Maxwell's concern with the execution and completion of the inter vivos trust at the time of signing, the record is in sharp conflict, as indicated above. The court could reasonably infer that she had no intention that the trust become effective unless and until the Los Altos home and the Lawson securities were included. There is no testimony that she ever directed Mr. Cotton to deliver the instrument to any of the trustees nor that she gave him any irrevocable directions to so deliver it. As Mr. Cotton was then her attorney, the court could justifiably find, under the circumstances of this case, that his possession constituted her possession and that she retained control. Possession by the grantor has been held to raise a presumption of nondelivery (Tweedale v. Barnett, 172 Cal. 271, 156 P. 483; Lample v. McDougall, 103 Cal.App. 779, 285 P. 328).

[16] The fact that Dr. Maxwell handed the instrument to Mr. Cotton after signing it, did not of itself constitute a delivery to him or authorize him to deliver the instrument to the trustees. The mere handing of an instrument to a third party does not comprise delivery or authorize that person to deliver the same to the assignee unless there are express and definite instructions to that effect and unless such directions are irrevocable

and the instrument is placed beyond the assignor's power of control or recall (Jeannerette v. Taylor, 2 Cal.App.2d 568 at p. 570, 38 P.2d 831; Estate of McConkey, 33 Cal.App.2d 554 at pp. 560-561, 92 P.2d 456; Bank of America v. Frost, 205 Cal.App.2d 614, 23 Cal.Rptr. 441; Kunde v. Kunde, 122 Cal.App.2d 624, 266 P.2d 608).

[17] Here, while the instrument was in fact given to the trustees by Mr. Cotton, there was no expressed intention by Dr. Maxwell that the instrument was to be so delivered. It was the duty of the trial court to weigh the conflicting evidence concerning Mr. Cotton's authority and the inferences to be drawn from the facts of his employment (Gagnon Co., Inc. v. Nevada Desert Inn, 45 Cal.2d 448, 459, 289 P.2d 466; Sullivan v. Dunne, 198 Cal. 183, 244 P. 343). As there was ample evidence that he was not authorized to deliver the agreement to the trustees, the fact that he did so and caused them to sign it is of no legal significance (Rothney v. Rothney, 41 Cal.App.2d 566, 570, 107 P.2d 294).

[18, 19] If Dr. Maxwell had no intention of divesting herself of control at the time, the handing of the instrument to Mr. Cotton and his manumission of the instrument to the trustees would not constitute a constructive or symbolic delivery sufficient to establish the trust. The delivery or absence of delivery to the trustees by way of the trust agreement was a question of fact to be determined by the trial court (Blackburn v. Drake, 211 Cal. App.2d 806, 27 Cal.Rptr. 651). We have concluded upon a consideration of the entire record that the court's finding that Dr. Maxwell never intended or effected delivery was sufficiently supported by the evidence (cf.

Pollard v. Pollard, 166 Cal.App.2d 698 at pp. 702-703, 333 P.2d 356). Emphasis added."

Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947.

LEFROOTH v. PRENTICE et al.
(L. A. 7848.)

Supreme Court of California. Sept. 27, 1927.

* * * *

"In the case of Edwards v. Guaranty Trust, etc., Bank, 47 Cal.App. 86, 89, 190 P. 57, 59, after citing with approval the doctrine of Provident Institution for Savings v. Sisters of the Poor, etc., 87 N. J. Eq. 424, 100 A. 894, the court said:

" 'To consitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive or symbolical delivery, without power of revocation.' 20 Cyc. 1193. In order to accomplish this, 'there must be a parting by the donor with all present and future legal power and dominion over the property.' 20 Cyc. 1196; Tracy v. Alvord, 118 Cal. 654, 50 P. 757; Pullen v. Placer County Bank, 138 Cal. 169, 66 P. 740, 71 P. 83, 94 Am. St. Rep. 19; Simmons v. Savings Society, 31 Ohio [St.] 457, 27 Am. Rep. 521; [Matthews v. Hanson, 145 Va. 614, 134 S. E. 568]. That the law of this state is as stated in the Provident Case, supra, will be seen by a perusal of that and the other cases cited therein, citing and quoting from the California cases at length."

[6] A rehearing in this case was denied by the Supreme Court. A careful examination of many cases reveals no exception to the rule announced in the above authorities. There is no different rule applicable to minors of tender years in a transaction with their parents than applies to a transaction between adults for as far as the legal steps are concerned they are in the two cases identical. In re Acken's Estate, 144 Iowa, 519, 123 N. W. 187, Ann. Cas. 1912A, 1166. The irresistible conclusion is that the father either did not intend to complete the gift or else, in attempting to execute his intention fell short of making a delivery of the securities as he failed utterly to surrender complete dominion or any dominion over the same. The delivery of the securities was therefore incomplete and ineffective to pass title."

* * *

Obranovich v. Stiller, 220 Cal.App.2d 205 34 Cal. Rptr. 923

* * * * *

"QUESTION PRESENTED

Sufficiency of the evidence to support the finding of nondelivery of the deed to take effect in the grantor's lifetime.

RECORD

In June, 1952, defendant's sister Pauline Palm handed to him a gift deed of certain real property in San Francisco. Defendant placed the deed in his safe deposit box. Mrs. Palm died July 17, 1960. Three days later defendant recorded the deed. Plaintiff Charles Henry

Obranovich is the nephew of Mrs. Palm. Individually and as special administrator of Pauline Palm's estate, he brought this action to quiet title in the estate to the property. Mrs. Palm left a will in which she divided the property equally between plaintiff and defendant. The court found that Mrs. Palm delivered the deed to defendant without the intent presently to transfer title to him, but intended to effectuate transfer of the property only upon her death. Accordingly judgment quieting title in plaintiff as special administrator was entered.

SUFFICIENCY OF EVIDENCE

Defendant's only contention on this appeal is that the evidence is insufficient to support the court's finding that the deed was delivered without intent to presently transfer title.

Before reviewing the evidence, we consider the law relating to the transfer of title to real property inter vivos.

[1] The well settled rule is succinctly stated by Mr. Justice Peters in Henneberry v. Henneberry (1958) 164 Cal.App.2d 125, 129, 330 P.2d 250, 252: "In addition to physical delivery, and an acceptance by the grantee, to constitute a valid delivery there must exist a mutual intention on the part of the parties, and particularly on the part of the grantor, to pass title to the property immediately. In other words, to be a valid delivery, the instrument must be meant by the grantor to be presently operative as a deed, that is, there must be the intent on the part of the grantor to divest himself presently of the title. Even if the document is manually delivered,

but the evidence shows that the parties or the grantor intended the document to become operative only upon death, the document is testamentary in character and void as a deed.

[2] "In determining this fundamental issue of intent, various presumptions and inferences arise in favor of the validity of the delivery because of due execution, manual transfer, possession of the document by the grantee, its acknowledgment and recordation. But these presumptions and inferences are all rebuttable. Declarations and acts of the grantor before and after the alleged delivery, and of the grantee afterwards, are admissible on this issue. Fundamentally, the question of intent is one of fact to be determined by the trier of the facts on all the evidence."

[3, 4] As we said in Blackburn v. Drake (1963) 211 Cal.App.2d 806, 811, 27 Cal.Rptr. 651, 654, "Delivery or absence of delivery is a question of fact to be determined by the trial court. * * * A deed delivered with the intent that it shall take effect only on the death of the grantor is an attempted testamentary disposition and therefore void."

In Blackburn v. Drake, supra, 211 Cal.App.2d pages 812-813, 27 Cal.Rptr. pages 655-656, Mr. Justice Molinari pointed out that there has been some confusion in the authorities in this state as to whether the possession of a deed raises a presumption or inference of delivery due to a difference in interpretation of section 1055, Civil Code, which provides that "A grant duly executed is presumed to have been delivered at its date."

He then refers to the cases holding each way respectively, and concludes that the question has been settled by the decision in Miller v. Jansen, 21 Cal.2d 473, 477, 132 P.2d 801, which holds that possession of a deed by the grantee raises an inference of delivery. But, says he, "Whatever the niceties of the law be as between a presumption and an inference insofar as the kind or amount of evidence necessary to dispel such presumption or inference, it is settled law that the inference of delivery and the presumption of date of delivery are rebuttable and in the face of contrary evidence become considerations of fact for the trial court or jury to determine. [Citations.] * * * Whether there was a delivery involved a disputed question of fact which was the function of the trial judge to determine from the facts and circumstances in evidence, it being within his province to pass upon the credibility of the witnesses, to weigh their testimony, and draw therefrom his inferences." (211 Cal.App.2d p. 813, 27 Cal.Rptr. p. 655) Defendant contends that where the word "delivery" is used in the authorities it means the manual transmission of the deed, whereas the "delivery" the authorities are talking about and the one with which we are concerned means delivery with intent to vest in the grantee immediate title to the property described in the deed. (See the quotation hereinbefore set forth from Henneberry, supra, 164 Cal.App.2d page 129, 330 P.2d page 252.)"

* * * *

"In contradiction of this evidence and supporting the court's finding that the transfer of title was not intended to occur until Mrs. Palm's death is the following: Defendant did not collect any of the rents from the prop-

erty, nor did he pay any taxes on the property. Mrs. Palm collected all the rents, paid the taxes and arranged and paid for the insurance. All that he did with respect to the property was to do some repair work when Mrs. Palm requested him to do so. Mrs. Palm continued to live in an apartment on the premises. Defendant did not file a gift tax return in 1952 after receiving the deed. Mrs. Palm never accounted to defendant for the rents. He did not declare any revenue from the property or expenses or depreciation on the property in his income tax returns. Defendant testified that he knew that his sister was reporting in her income tax return the rentals received by her from the property. In a letter written to Mr. and Mrs. Michael, after the date of the delivery of the deed, Mrs. Palm stated that the property "will be" defendant's, which statement is not consistent with her having already passed title to defendant.

"The retaining of possession of the property by plaintiff and the exercising of acts of proprietorship over it by her are evidence of ownership and a lack of delivery of the deed." (Labadie v. Labadie (1943) 57 Cal.App. 2d 456, 464, 134 P.2d 858, 861.) "Exercise of dominion over property after the execution of a deed is incompatible with delivery and inconsistent with divestiture of title. [Citations.] While such dominion does not negate delivery as a matter of law, its incompatibility with delivery renders it a circumstance to be considered by the trier of fact on the question of delivery or nondelivery, particularly when coupled, as here, with the circumstance of nonexercise of dominion by the

grantees." (Blackburn, supra, 211 Cal.App.2d p. 818, 27 Cal.Rptr. p. 658.)

The testimony of defendant's witness Mrs. Svoboda hereinbefore related clearly shows that Mrs. Palm did not intend title to pass until her death; defendant was "to have the property when I have passed on."

"It is interesting to note that defendant did not testify as to anything that Mrs. Palm said to him when she handed him the deed, nor to any discussion between them as to her continuing to live in the property, to manage it and collect the rents, etc. It seems strange that his sister would hand him a deed to transfer immediate title without discussion as to what her relationship to the property was to be thereafter. Defendant testified that no witnesses were present when the deed was given him. His failure to disclose what was said, coupled with his not recording the deed until after her death, plus her complete control and management of the property, strongly indicate that it was intended not only by Mrs. Palm, but by defendant as well (although it is Mrs. Palm's intent with which we are primarily concerned (Blackburn, supra, 211 Cal.App.2d p. 811, 27 Cal.Rptr. p. 654)) that the deed was only to have a testamentary effect."

* * * *

APPENDIX I

HALL, HENRY & OLIVER
Balfour Building
San Francisco 4, California
GArfield 1-2470

CHARLES S. WHEELER, JR.
Mills Tower
San Francisco, California
SUtter 1-6361

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

In the Matter of the Estate of JAMES IRVINE, Deceased.	No. 108086 Dept. No. 9

REPORT OF EXECUTORS ACCOMPANYING FIRST ACCOUNT AND PETITION FOR SETTLEMENT OF SAID ACCOUNT AND FOR ALLOWANCE ON ACCOUNT OF EXECUTORS' COMMISSIONS AND ATTORNEYS' FEES

TO THE HONORABLE, THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO:

KATHARINE BROWN IRVINE, MYFORD IRVINE and ROBERT H. GERDES, Executors of the Last Will and Testament of James Irvine, Deceased, herewith present their First Account as such executors and their report accompanying said First Account, and their Petition for Settlement of said Account and for allowance on account of executors' commissions and attorneys' fees, to wit:

"EXHIBIT "K"
CASH DISBURSEMENTS"
(1)

1947		
September 25	Paid Crocker Estate Co., office rental for September	$ 195.00
September 25	Paid Myford Irvine, net salary for August	225.70
September 25	Paid Edna M. Price, net salary for August	569.20
September 25	Paid G. L. Beaubien, net salary for August	335.50
September 25	Paid Paul Dinsmore, net salary for August	96.40
September 29	Paid Edna M. Price, net salary for September	580.20
September 29	Paid G. L. Beaubien, net salary for September	335.50
September 29	Paid Paul A. Dinsmore, net salary for September	96.40
October 1	Paid Paul A. Dinsmore, travel expense	12.44
October 1	Paid Crocker Estate Co., office rental for October	195.00
October 7	Paid Department of Employment, unemployment tax for the period July 1-August 25, 1947	303.34
October 7	Paid Collector of Internal Revenue, social security tax for the period July 1-August 25, 1947	202.22
October 10	Paid Collector of Internal Revenue, employees' taxes withheld during period August 25-September 30, 1947	1,078.85
October 14	Paid Paul A. Dinsmore, travel expense	67.55
October 20	Paid cash, postage	6.00
October 21	Paid Pacific Telephone and Telegraph Co., telephone tolls	45.47
October 22	Paid McLaren, Goode & Co., accounting service	100.00
October 30	Paid Edna M. Price, net salary for October	580.20
October 30	Paid G. L. Beaubien, net salary for October	338.50

"EXHIBIT "K"
CASH DISBURSEMENTS"
(2)

1947		
October 30	Paid Paul A. Dinsmore, net salary for October	$ 96.40
November 7	Paid Title Insurance and Guaranty Company, revenue stamps	25.50
November 20	Paid Edna M. Price, net salary for November	580.20
November 20	Paid G. L. Beaubien, net salary for November	343.50
November 20	Paid Paul A. Dinsmore, net salary for November	96.40
December 1	Paid Crocker Estate Co., office rental for December	195.00
December 2	Paid Paul A. Dinsmore, travel expense	40.48
December 10	Paid Paul A. Dinsmore, reimbursement for telephone tolls	10.12
December 19	Paid Edna M. Price, net salary for December	580.20
December 19	Paid G. L. Beaubien, net salary for December	343.50
December 19	Paid Paul A. Dinsmore, net salary for December	96.40
1948		
January 3	Paid Crocker Estate Co., office rental for January	195.00
January 30	Paid Edna M. Price, net salary for January	566.20
January 30	Paid G. L. Beaubien, net salary for January	335.50
January 30	Paid Paul A. Dinsmore, net salary for January	96.40
February 2	Paid Crocker Estate Co., office rental for January	195.00
February 26	Paid Edna M. Price, net salary for February	566.20
February 26	Paid G. L. Beaubien, net salary for February	335.50

"EXHIBIT "K"
CASH DISBURSEMENTS"
(3)

1948		
February 26	Paid Paul A. Dinsmore, net salary for February	$ 96.40
April 20	Paid Edna M. Price, net salary for April	566.20
April 20	Paid G. L. Beaubien, net salary for April	335.50
April 20	Paid P. A. Dinsmore, net salary for April	96.40
July 22	Paid Edna M. Price, net salary for July	559.70
July 22	Paid G. L. Beaubien, net salary for July	347.30
August 20	Paid Edna M. Price, net salary for August	559.70
August 20	Paid G. L. Beaubien, net salary for August	351.30
August 20	Paid Pacific Telephone & Telegraph Co., telephone tolls	47.18
September 1	Paid Crocker Estate Co., office rental for September	195.00
September 10	Paid Anglo California National Bank, August employees' income tax withholdings	135.00
November 29	Paid Edna M. Price, net salary for November	559.70
November 29	Paid G. L. Beaubien, net salary for November	355.30

APPENDIX J

November 7, 1947

ESTATE OF
JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

Dear Mr. Hellis:—

Enclosed find the following certificates of stock of The Irvine Company — all in the name of James Irvine and all endorsed by him —

Cert. 28	332 shares
34	2 shares
43	1 shares
44	1 shares
53	1 shares
45	10 shares
46	10 shares
47	10 shares
48	10 shares
49	5 shares
50	5 shares
51	123 shares
	510 shares

Also, enclosing Consents of the Controller of the State of California and the Tax Commissioner of the State of West Virginia.

Also Documentary Stamps in the sum of $25.50. being at the rate of 5¢ per $100. Par Value of stock. These are the only dominations I could get, but I am in hope the bank there may give you the actual donomination of stamps in exchange for the larger amounts.

Kindly transfer this stock into the name of The James Irvine Foundation. I think five 100s and one 10 will be all right.

Yours truly,

/s/ E. M. PRICE

Secretary.

APPENDIX K

DEPOSITION TESTIMONY OF CHAFFEE E. HALL, ATTORNEY FOR THE EXECUTORS OF THE WILL OF JAMES IRVINE, DECEASED

* * *

Q I see. Well, when you received from the controller the consents —

A Yes.

Q — did you send them to Miss Price?

A Yes, to Miss Price.

Q Yes, to Miss Price.

A Either to Miss Price or to Mr. Irvine.

Q And you talked to either one of them, is that right?

A That is right.

Q Well, I want to show you a letter which is in evidence here as Defendants' Exhibit D-2, Defendants' Exhibit D-2 dated November 7th.

MR. PRIVETT: I don't think that is in evidence yet, Mr. Young. We have marked those documents for identification. We won't put them into evidence until we put on Mr. Hellis or the other parties that received them.

MR. YOUNG: Well, I thought they had gone in.

A Yes. This is a request by Miss Price, Secretary, to a Mr. Hellis, enclosing certificates for shares of The

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Rptrs. Transcript, pp. 1250

Irvine Company totaling 510 shares, with consents of the Controller of the State of California and the Tax Commissioner of the State of West Virginia with documentary stamps, and asking them to transfer these certificates into the name of The Foundation on the books of the corporation.

BY MR. YOUNG:

Q Well, had you ever seen any of these certificates?

A Never.

Q Personally?

A Never.

Q Did Miss Price tell you that she had them, when you told her you had the consents?

A Yes.

* * *

A I had nothing to do with the indenture of trust nor with The Irvine Foundation, nor any inter vivos transfers of Mr. Irvine.

Rptrs. Transcript, pp. 1251

Rptrs. Transcript, pp. 1254

APPENDIX L

NOTICES OF MEETINGS OF THE MEMBERS AND DIRECTORS OF THE JAMES IRVINE FOUNDATION ON THE PERSONAL STATIONERY LETTERHEAD OF "JAMES IRVINE" SHOWING THAT THE FOUNDATION AND JAMES IRVINE ARE ONE AND THE SAME ENTITY

JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO, CALIF.

820 CROCKER BUILDING,
SAN FRANCISCO, CALIF.

May 22nd, 1939.

NOTICE OF ANNUAL MEETING OF THE MEMBERS OF THE JAMES IRVINE FOUNDATION.

Notice is hereby given that the regular annual meeting of the members of The James Irvine Foundation will be held at the office of the Company at Room 820 of the Crocker Building at the corner of Post and Market Streets, San Francisco, California, at the hour of 2 P.M. on Wednesday, the 31st day of May, 1939.

E. M. PRICE,
Secretary, The James Irvine Foundation.

JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

April 18, 1945.

NOTICE OF REGULAR ANNUAL MEETING OF THE MEMBERS OF THE JAMES IRVINE FOUNDATION.

Notice is hereby given that the regular annual meeting of the members of The James Irvine Foundation will be held at the office of the Company at Room 820 of the Crocker Building, at the corner of Post and Market Streets, San Francisco, California, at the hour of 2 P.M. on Tuesday, May 8, 1945.

E. M. PRICE,
Secretary, The James Irvine Foundation.

* * *

(Copies of this letter sent to Messrs. McFadden, Searborough, Dinsmore, McLaren, Gerdes and Mrs. Irvine.)

JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

April 17, 1945.

DEAR

Please be at the office at 12:15 on Tuesday, May 8th, so that we can have luncheon together before the annual meeting of The Foundation.

Yours Truly,

(Signed) MYFORD IRVINE.

JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

December 7, 1945.

NOTICE OF SPECIAL MEETING OF THE BOARD OF DIRECTORS OF THE JAMES IRVINE FOUNDATION.

Notice is hereby given that a special meeting of the Board of Directors of The James Irvine Foundation will be held at the office of the Company at Room 820 of the Crocker Building, at the corner of Post and Market Streets, San Francisco, California, at the hour of 4 P.M. on Thursday, December 13, 1945.

E. M. PRICE,
Secretary, The James Irvine Foundation.

Due to lack of a quorum, the annual meeting will adjourn to Wednesday, June 26th, 1946, at 2 P.M.

NOTICE OF REGULAR ANNUAL MEETING OF THE MEMBERS OF THE JAMES IRVINE FOUNDATION

Notice is hereby given that the regular annual meeting of the members of The James Irvine Foundation will be held at the office of the Company at Room 820 of the Crocker Building, at the corner of Post and Market

Streets, San Francisco, California, at the hour of 2 P.M. on Tuesday, May 14, 1946.

Secretary,
The James Irvine Foundation.

Present:
IRVINE
GERDES

JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

June 12, 1946.

NOTICE OF ADJOURNED ANNUAL MEETING OF THE MEMBERS OF THE JAMES IRVINE FOUNDATION

Notice is hereby given that the adjourned annual meeting of the members of The James Irvine Foundation will be held at the office of the Company at Room 820 of the Crocker Building, at the corner of Post and Market Streets, San Francisco, California, at the hour of 2 P.M. on Wednesday, June 26th, 1946 at 2 P.M.

E. M. PRICE,
Secretary,
The James Irvine Foundation.

JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

NOTICE OF REGULAR ANNUAL MEETING OF THE MEMBERS OF THE JAMES IRVINE FOUNDATION

Notice is hereby given that the regular annual meeting of the members of The James Irvine Foundation will be held at the office of the Company at Room 820 of the Crocker Building, at the corner of Post and Market Streets, San Francisco, California, at the hour of 2 P.M. on Tuesday, May 13, 1947. However, no business will be transacted at this meeting and an adjourned meeting will be held on Tuesday, June 10, 1947, at 2 P.M.

E. M. PRICE,
Secretary,
The James Irvine Foundation.

Present:

M. IRVINE
P. A. DINSMORE
N. L. MCLAREN
A. J. MCFADDEN
ROBERT GERDES
J. G. SCARBOROUGH

ESTATE OF
JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

NOTICE OF REGULAR ANNUAL MEETING OF THE MEMBERS OF THE JAMES IRVINE FOUNDATION.

Notice is hereby given that the regular annual meeting of the members of The James Irvine Foundation will be held at the office of the Company at Room 820 of the Crocker Building, at the corner of Post and Market Streets, San Francisco, California, at the hour of 2 P.M. on Tuesday, June 8, 1948.

E. M. PRICE,
Secretary,
The James Irvine Foundation.

ESTATE OF
JAMES IRVINE
CROCKER BUILDING
SAN FRANCISCO 4, CALIF.

NOTICE OF REGULAR ANNUAL MEETING OF THE MEMBERS OF THE JAMES IRVINE FOUNDATION.

Notice is hereby given that the regular annual meeting of the members of The James Irvine Foundation will be

held at the office of the Company at Room 820 of the Crocker Building, at the corner of Post and Market Streets, San Francisco, California, at the hour of 10 A.M. on Wednesday, May 18, 1949.

E. M. PRICE,
Secretary,
The James Irvine Foundation.

APPENDIX M

MINUTES OF DIRECTORS MEETING THE IRVINE COMPANY

April 26, 1941

A special meeting of the Board of Directors of The Irvine Company was held at the office of the Company near Tustin, California, on the 26th day of April, 1941, at 2 o'clock P.M.

The purpose of the meeting was the declaration of dividends and such other matters as might properly come before such meeting. There were

Present:

JAMES IRVINE
W. B. HELLIS
P. A. DINSMORE
C. M. PLUM

Absent:

MYFORD IRVINE

Waiver of notice duly signed by all members of the Board is attached and made a part of this record.

The meeting was called to order by James Irvine, who acted as chairman. The minutes of the director's meeting held December 26, 1940 were read and approved.

The secretary of the company stated that he had made an examination of the accounts and records and estimated the earnings of the company for the current fiscal year to be $500,000. The following resolution was offered by P. A. Dinsmore and its adoption moved:

"RESOLVED that there is hereby declared a dividend No. 46 at One Hundred ($100) dollars per share, on the capital stock of this company, payable in cash, and that the secretary is hereby instructed to pay said dividend to the holders of stock on this date, April 26th, 1941."

The motion to adopt was seconded by C. M. Plum and unanimously carried.

There being no further business the meeting adjourned.

W. B. HELLIS,
Secretary.

JAMES IRVINE,
Chairman.

APPENDIX N

STOCKHOLDERS CERTIFICATE RECORD OF THE IRVINE COMPANY SHOWING THE STOCK TRANSACTIONS OF JAMES IRVINE WITH THE IRVINE COMPANY AND PARTICULARLY THE SURRENDER FOR CANCELLATION BY JAMES IRVINE ON APRIL 21, 1941, OF CERTIFICATES NO. 33 AND 42 REPRESENTING 173 SHARES OF STOCK OF THE IRVINE COMPANY AND THE RE-ISSUANCE TO JAMES IRVINE OF CERTIFICATES NO. 45 THROUGH 51 TOTALLING THE SAME 173 SHARES OF THE SURRENDERED STOCK OF THE IRVINE COMPANY BY JAMES IRVINE

In Whose Name.	CERTIFICATE ISSUED.				Signature.
	Ledger Folio.	No. Certificate.	No. Shares.	Total No. Shares.	Subject to By-Laws of Company.

I HEREBY CERTIFY THAT THIS IS A PHOTOSTATIC COPY OF THE ORIGINAL ON FILE IN MY OFFICE.

THE IRVINE COMPANY

By C S Wheeler

Charles S. Wheeler, Secretary

AUG 1 1968

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THE IRVINE COMPANY.
By C. S. Wheeler
Charles S. Wheeler, Secretary
AUG 1 1969

2

The

DATE.	BY WHOM SURRENDERED.	CERTIFICATE CANCELLED.			LEFT BY
		Ledger Folio.	No. Certificate.	No. shares.	
1894					
Dec 15	Jno. A. Thayer	1	1	1	W.H. Wilde
" "	Billin McDonald	2	2	1	W.H. Wilde
" "	Fred H. Rett	3	3	1	W.H. Wilde
" "	A. W. Johnson	4	4	1	W.H. Wilde
" "	H. P. Dimmick	5	5	1	W.H. Wilde
1898 May June 6	George Irvine	6	6	1/6	Geo Irvine
Dec 1	E. H. Lamme	7	7	1	E.H. Lamme
1901 June 20	C. F. Krauss	8	8	1	C.F. Krauss
" "	James Irvine	9	9	1	Jas. Irvine
" "	Frances A. Irvine	10	10	1	F.A. Irvine
" "	James Irvine	9	11	10,000	J. Irvine
" "	James Irvine	9	12	5	J. Irvine
" "	James Irvine	9	13	1000	J. Irvine
" "	Richard Egan	11	14	1	R. Egan
" "	James G. Scarborough	12	15	1	J.G. Scarb
1902 May 27	Richard Egan	11	16	1	
May 27	James G. Scarborough	12	17	1	

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THE IRVINE COMPANY
By C. S. Wheeler
Charles S. Wheeler, Secretary
AUG 1 1968

3

Irvine Company

IN WHOSE NAME.	CERTIFICATE ISSUED. Ledger Folio.	No. Certificate.	No. Shares.	Total No. Shares.	SIGNATURE. Subject to By-Laws of Company.
Jno. A. Thayer	1	1	1	1	Jno A Thayer per W. H. Wiele atty in fact
Bilton McDonald	2	2	1	1	Bilton McDonald per W. H. Wiele atty in fact
Fred H. Scott	3	3	1	1	F H Scott per W. H. Wiele atty in fact
A. W. Johnson	4	4	1	1	A W Johnson per W. H. Wiele atty in fact
H. P. Devonshire	5	5	1	1	H P Devonshire per W. H. Wiele atty in fact
George Irvine	6	6	1	1	George Irvine
E. H. Lamme	7	7	1	1	E H Lamme
C. F. Krames	8	8	1	1	C. F. Krames
James Irvine	9	9	1	1	James Irvine
Frances A. Irvine	10	10	1	1	Frances A. Irvine
James Irvine	9	11	10.000	10.000	James Irvine
James Irvine	9	12	5	5	James Irvine
James Irvine	9	13	1.000	1.000	James Irvine
Richard Egan	11	14	1	1	Richard Egan
Jas. G. Scarborough	12	15	1	1	Jas. G. Scarborough
Richard Egan	11	16	1		Richard Egan
Jas. G. Scarborough	12	17	1		Jas. G. Scarbo...

4

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THE IRVINE COMPANY
By C S Wheeler
Charles S. Wheeler, Secretary
AUG 1 1968

DATE.	BY WHOM SURRENDERED.	CERTIFICATE CANCELLED. Ledger Folio.	No. Certificate.	No. Shares.	LEFT BY
1909 Feb 25	Frances A. Irvine	10	19	1	F.B. Browning
1908 Jan 28	James Irvine	9	20	996	J. Irvine
1909 Aug 24	Do	9	21-24	996	Do
1918 Apl 30	C.F. Krauss	8	18	1	Do
1921 Mar 12	James Irvine	9	26	332	Do
1923 Apl 17	" "	9	27	332	"
1924 May 29	F.B. Browning	13	25	1	"
~~1925 May 15 W.G. Whitehead~~		~~9~~	~~27~~	~~1~~	~~"~~
1927 Nov. 18 1925		9	28	332	
May 15 1935	W.G. Whitehead	14	29	1	
Sept 15 1935		15	30	700	
Aug 17		9	31	137	
1951 Feb 21	James Irvine	9	33	137	

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Charles S. Wheeler, Secretary
AUG 1 1968

5

IN WHOSE NAME.	CERTIFICATE ISSUED. Ledger Folio.	No. Certificate.	No. Shares.	Total No. Shares.	SIGNATURE. Subject to By-Laws of Company.
C. F. Krauss	8	18	1		C. F. Krauss.
Frances A. Irvine	10	19	1		Frances A. Irvine
James Irvine	9	20	996		James Irvine
James Irvine	9	21 ~~1~~	249		James Irvine.
do	9	22	249		James Irvine
do	9	23	249		James Irvine
do	9	24	249		James Irvine
F. B. Browning	13	25	1		~~F. B.~~ Browning.
Richard Egan	—	—	—		—
James Irvine	9	26	332		James Irvine
"	9	27	332		James Irvine
"	9	28	332		James Irvine
W. G. Mitchell	14	29	1		W. G. Mitchell
James Irvine Jr	15	~~200~~ 30	200		James Irvine Jr.
James Irvine	9	31	132		James Irvine
Myford P. Irvine	16	32	200		Myford Irvine
James Irvine	9	33	132		James Irvine

6

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By C S Wheeler
Charles S. Wheeler, Secretary
AUG 1 1968

DATE.	BY WHOM SURRENDERED.	CERTIFICATE CANCELLED. Ledger Folio.	No. Certificate.	No. Shares.	LEFT BY
1947 Nov. 18		9	34	2	
1936 Jan. 18 1938	W B Fellows	17	35	1	
June 1 1943	C. R. Benning	18	36	1	
Dec. 18 1948	James Irvine Hunter	9	37	50	
Jan 14 1935	Anglo Cal. National Bank	9	38	40	
Nov. 29 1947	James Irvine James Irvine Hunter	9	*39 ~~42~~	~~44~~	
Dec. 30. 1936	Jas. A. A.	9	40	200	
Dec. 24 1941.		19	41	1	
April 21 1947.	James Irvine	9	*42	41	
Nov 18		9	43	1	
Nov. 18		9	44	1	
Nov 18		9	45	10	
Nov 18		9	46	10	
Nov 18		9	47	10	
Nov 18		9	48	10	
Nov 18		9	49	5	
Nov 18		9	50	5	

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THE IRVINE COMPANY
By C. S. Wheeler
Charles S. Wheeler, Secretary
AUG 1 1968

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IN WHOSE NAME.	CERTIFICATE ISSUED. Ledger Folio.	No. Certificate.	No. Shares.	Total No. Shares.	SIGNATURE. Subject to By-Laws of Company.
James Irvine	9	34	7		James Irvine
W. B. Hellis	17	35	1	1	W. B. Hellis
C. R. Browning	18	36	1		C R Browning
James Irvine Trustee — K.A.L. Trust May 1931	9	37	50		James Irvine Jr.
James Irvine	9	38	40		James Irvine
" "	9	39	42		James Irvine
James Irvine Trustee — A.A.I. Trust May 1931	9	40	700		James Irvine (Jr.)
Ernst Behr	19	41	1		Ernst Behr
4-9-35 James Irvine	9	44	41		
12-5-36 " "	9	43	1		
9-21-38 " "	9	45	1		
12-5-39 " "	9	45	10		
" " "	9	46	10		
" " "	9	47	10		
" " "	9	48	10		
" " "	9	49	5		
" " "	9	50	5		

8

DATE.	BY WHOM SURRENDERED.	CERTIFICATE CANCELLED. Ledger Folio.	No. Certificate.	No. Shares.	LEFT BY
1947 Nov 18		9	51	123	
Dec 30	Myford Irvine	20	52	50	
1947 Nov 18		9	53	1	
Dec 7/48	Myford Irvine	16	32	200	
Dec. 22, 1952	Athalie R. Clarke, Executrix	22	55	200	
Dec. 22, 1952	Athalie Irvine Swinden	26	60	200	
Dec. 2, 1957	Athalie R. Clarke, Executrix	27	62	100	
Feb. 17, 1958	William Thornton White Jr. Exec. of Flora Irvine Armsby Irvine Estate	24	57	40	
Nov. 24, 1958	Myford Irvine	16	59	160	
Mar. 17, 1960	Flora Wood Irvine, Exec. of the Will of Myford Irvine, Deceased	16	66	150	
Sept 14 1960	Flora Wood Irvine, Exec of the Will of M. Irvine Deceased	31	68	130	
				16,259	

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THE IRVINE COMPANY

By C. S. Wheeler
Charles S. Wheeler, Secretary

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9

IN WHOSE NAME.	CERTIFICATE ISSUED. Ledger Folio.	No. Certificate.	No. Shares.	Total No. Shares.	SIGNATURE. Subject to By-Laws of Company.
James Irvine	9	51	123		
Myford Irvine	20	52	50		
Jane A. Irving	9	53	1		
The James Irvine Foundation	21	54	510		
Athalie R. Clarke, guardian of the person & estate of Athalie Ann Irvine, a minor	22	55	200		
Kate Lillard Wheeler	23	56	50		
Katherine Brown Irvine	24	57	40		
trustee First Natl Bank of S.F. & Helena E. Irvine as Trustees	25	58	40		
Myford Irvine	16	59	160		
Athalie Irvine Swinden	26	60	200		
Athalie R. Clarke as Trustee	27	61	100		
Athalie R. Clarke as Trustee	27	62	100		
Athalie Irvine Clarke	28	63	100		
Wm. T. White Jr. as Trustee of the Katherine Irvine First Created by the Will of	29	64	40		
Katherine Brown Irvine, Dec.					
Security First National Bank & Elsie Wood Irvine Trustees	30	65	10		
Myford Irvine	16	66	150		
Elsie Wood Irvine, Exec. of the Will of W. L. Wood	31	67	20		
" " "	31	68	130		

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THE IRVINE COMPANY
By C. S. Wheeler
Charles S. Wheeler, Secretary
AUG 1 1968

DATE.	BY WHOM SURRENDERED.	CERTIFICATE CANCELLED.			LEFT BY
		Ledger Folio.	No. Certificate.	No. Shares.	

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THE IRVINE COMPANY

By C S Wheeler
Charles S. Wheeler, Secretary

AUG 1 1968

11

IN WHOSE NAME.	CERTIFICATE ISSUED.				SIGNATURE. Subject to By-Laws of Company.
	Ledger Folio.	No. Certificate.	No. Shares.	Total No. Shares.	
Macco Corporation	32	69	15		
Gloria Wood Irvine, Exec of Will of H. Irvine, deceased	31	70	115		
			19259		

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THE IRVINE COMPANY
By C. S. Wheeler
Charles S. Wheeler, Secretary

AUG 1 1968

APPENDIX O

TREASURY DEPARTMENT
WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO

IT:P:T:1
LLA

The James Irvine Foundation,
Room 820, Crocker Building,
San Francisco, California.

Sirs:

Reference is made to the evidence submitted in support of your claim to exemption from Federal income taxation.

The evidence presented discloses that you were incorporated in 1936 under the laws of the State of California and that you are formed solely for charitable purposes, namely, public welfare, health, education, comfort, happiness, and general well-being, particularly of the citizens and residents of the State of California. You have power to receive property by gift, devise, or bequest and to act as trustee under any trust incidental to the purposes for which you were formed. You are governed by a board of directors composed of seven members. It is stated in the affidavit submitted that

James Irvine contributed $5,000.00 to your fund in 1937 and that in 1938 he contributed additional cash and real estate; that during the year 1937 your corporation made such expenditures as were necessary for directors' fees, costs of incorporation, etc.; that during the year 1938 some disbursements were made, including directors' fees, and a contribution of $1,000.00 was made to the San Francisco Community Chest; and that none of your income can inure to the benefit of any private shareholder or individual.

Based upon the facts presented it is held that you are entitled to exemption under the provisions of section 101(6) of the Revenue Act of 1938 and the corresponding provisions of the Revenue Act of 1936. You are not, therefore, required to file returns of income for 1936, 1937, and 1938. Inasmuch as section 101(6) of the Internal Revenue Code (53 Stat., Part 1) is similar to section 101(6) of the Revenue Act of 1938, returns for 1939 and subsequent years will not be required so long as there is no change in your organization, your purposes or your method of operation.

Any changes in your form of organization or method of operation should be immediately reported to the collector of internal revenue for your district in order that the effect of such changes upon your present exempt status may be determined.

The exemption referred to in this letter does not apply to taxes levied under other titles or provisions of the respective revenue acts or of the Internal Revenue Code, except insofar as exemption is granted expressly

under those provisions to organizations enumerated in section 101 of the Revenue Act of 1938 and the corresponding provisions of the Revenue Act of 1936 or section 101 of the Internal Revenue Code.

Contributions to your organization by individual donors are deductible by such individuals in arriving at their taxable net income in the manner and to the extent provided by section 23(o) of the Revenue Act of 1938 and the corresponding provisions of the Revenue Act of 1936, section 23(o) of the Internal Revenue Code, and section 23(o) of the Internal Revenue Code as amended by section 224 of the Revenue Act of 1939. The deductibility of contributions by corporations is governed by section 23(q) of the Revenue Acts of 1936 and 1938, section 23(q) of the Internal Revenue Code, and section 23(q) of the Internal Revenue Code as amended by section 224 of the Revenue Act of 1939.

A copy of this ruling is being transmitted to the collector of internal revenue for your district.

By direction of the Commissioner.

Respectfully,

/s/ J. Mooney
Deputy Commissioner.

APPENDIX P

BLONDE v. JENKINS, ESTATE OF
281 P.2d 14 130 Cal.App. 417

* * *

[1, 2] The record is destitute of any evidence that appellant ever asserted any claim to the shares until after the death of Jenkins. Under such circumstance, the claim of a gift can be sustained only "by clear and satisfactory evidence of every element which is requisite to constitute a gift." Denigan v. Hibernia Savings & Loan Society, 127 Cal. 137, 141, 59 P. 389, 390; Humble v. Gay, 168 Cal. 516, 520, 143 P. 778. Gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts. Ibid. Because of the facility with which, after a donor is dead, a fraudulent claim of ownership may be founded on a pretended gift, assertedly made while the donor was living, it is but a salutory precaution which requires explicit and convincing evidence of every element that constitutes a valid gift *inter vivos*. Sullivan v. Shea, 32 Cal.App.369, 371, 162 P. 925.

[3, 4] In order to make a valid gift, a donor must not only make delivery and part with control of the object claimed, but the donor must at the same time have the intention to complete a presently effective gift and a delivery amounting to a present transfer of title. Bishop's School Upon the Scripps Foundation v. Wells, 19 Cal.App.2d 141, 146, 65 P.2d 105; Knight v. Tripp, 121 Cal. 674, 678, 54 P. 267; In re Estate of McEuen, 18 Cal.App.2d 180, 181, 63 P.2d 332. And that intention must be executed by a complete and uncondi-

tional delivery. In re Estate of McEuen, supra; Sullivan v. Shea, supra. The donee has the burden to prove the gift.

[5-7] Appellant contends that after the certificates were delivered to her, she returned them to Mr. Jenkins for safekeeping. In other words, she re-vested in him all that he had delivered to her. The certificates were restored to the same pigeon hole, drawer or strong box that had hitherto retained them. They never left the custody of the owner on December 1, 1952. All that passed between Mr. Jenkins and appellant was words. He had, after the conversation, all he had ever had. If he talked about giving the stock, he still retained possession and dominion over it after she had gone. To constitute a valid gift *inter vivos*, the gift must be complete by actual delivery without power of revocation. Edwards v. Guaranty Trust & Savings Bank, 47 Cal.App. 86, 89, 190 P. 57; Lefrooth v. Prentice, 202 Cal. 215, 225, 259 P. 947; Morehead v. Turner, 41 Cal.App.2d 414, 42.., 106 P.2d 969. If dominion and control over the gift is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift. Morehead v. Turner, supra; Beebe v. Coffin, 153 Cal. 174, 177, 94 P. 766. Reserving dominion and control over property is fatal to the asserted gift thereof. To accomplish a gift *inter vivos*, the donor must divest himself completely of the power of revocation. Edwards v. Guaranty Trust & Savings Bank, supra.

* * * *

APPENDIX Q

THIS INDENTURE OF TRUST, made this 24th day of February, 1937, by and between JAMES IRVINE, of San Francisco, California, Trustor, and THE JAMES IRVINE FOUNDATION, a corporation organized and existing under the laws of the State of California, Trustee,

W I T N E S S E T H:

That the Trustor hereby transfers, assigns and conveys to the Trustee, to have and to hold in trust, nevertheless and for the following trust uses and purposes, the following securities, to-wit:

505 shares of the capital stock of The Irvine Company, a corporation organized and existing under the laws of the State of West Virginia, and evidenced by the following certificates for the following number of shares, to-wit:

Certificate Number	Number of Shares
28	332
33	132
42	41

Also, the 200 shares of the capital stock of The Irvine Company now evidenced by Certificate Number 40, and now held in trust under the terms set forth in that certain Indenture of Trust dated May 21, 1921, between James Irvine, Jr. and James Irvine, and all interest, present and future, of the Trustor herein in or to said 200 shares or any thereof.

Also — 12,750 — shares of The Moraga Company, a corporation organized and existing under the laws of the State of California, and evidenced by the following certificates for the following number of shares, to-wit:

Certificate Number	Number of Shares
33	10,200
54	400
55	400
56	400
57	400
58	200
66	100
67	200
68	200
69	200
71	50

It is understood and hereby made an express term and condition of this trust that other and additional securities or other property may from time to time hereafter be added by the Trustor to the trust property and become a part of the corpus of this trust, to be held under all of the terms hereof.

It is also understood and hereby made an express term and condition of this trust that the Trustor may at any time and from time to time, at his sole will and discretion, by written instrument filed with the Trustee, revoke this trust in whole or in part, and may withdraw therefrom all or any part or parts of the property which may have been contributed to this trust by him, including all or any part or parts of the stocks hereinabove spe-

cifically described; and upon any such withdrawal, the Trustee shall forthwith convey and transfer by proper instruments and deliver the property affected thereby to the Trustor; and the Trustor may at any time amend this trust without limitation, or amend or cancel any amendments thereto.

It is a further express condition of this trust that the Trustor does hereby reserve to himself the sole and absolute right to receive, and said Trustor shall receive, during his lifetime, as his sole and separate property, all rents, interest, dividends, earnings, profits and other income from the Trust property, and also any liquidating dividends and other moneys or property which constitute withdrawals from, or diminution of capital (whether of any corporation whose stock is held hereunder or of any other trust property hereunder) and which when paid to and received by the Trustor would not constitute taxable income of the Trustor. The Trustor also reserves to himself, and he shall have the sole right, during his lifetime, to vote each and all of the shares of stock held in this trust. The Trustor hereby binds himself, during his lifetime, to pay, when due, all taxes, assessments, insurance, liens, charges and/or expenses necessary or proper for the preservation, maintenance or care of the trust property.

Any proceeds or profits from the corpus of the trust property (as distinguished from income thereof), which may accrue during the lifetime of the Trustor, and also all liquidating dividends and all other payments to the Trustor or the Trustee out of capital (whether of any corporation whose stock is held hereunder or of any

other trust property hereunder) other than as hereinabove specifically reserved to the Trustor, shall be paid to and shall be invested by the Trustee in such property or securities as may be approved by the Trustor, and all rents, interest, dividends and other income of any such investments shall, during the lifetime of the Trustor, be paid to and belong to the Trustor as his sole and separate property.

After the death of the Trustor, all rents, interest, dividends and other income and profits of the trust property shall be collected and received by the Trustee and shall be used, applied and devoted as follows:

1. There shall first be paid out of the same all taxes, general and special assessments and all costs, charges and expenses incurred or expended in the collection, care, administration and protection of the trust property, for the payment of which this trust and/or the Trustee may become chargeable, including the protection of this trust, and its defense against legal attack, and also including any and all compensation to, and/or traveling and other expenses of, the officers, directors or employees of the Trustee in connection with their services in the care, administration and protection of the trust property, as the Board of Directors of the Trustee, in its discretion, may deem reasonable or necessary. Then there shall be paid out of said income from time to time, as the Board of Directors of the Trustee may in its discretion determine, such amounts as may be necessary to make good or replace losses suffered in the corpus of the trust property.

2. Out of the balance of said income, after the deductions hereinabove provided, the Trustee may, and in the judgment of the Trustor should, each year set aside such sum as the Board of Directors of the Trustee shall in its sound discretion deem wise and expedient for investment, and said Trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investments, when made, shall become a part of the corpus or principal of the trust property, and the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided.

3. The balance of said income, after the deductions and investments hereinabove provided, shall be used, applied and devoted by the Trustee exclusively to or for the advancement of any charitable use or purpose in the State of California as now is or may hereafter be authorized in the Articles of Incorporation of the Trustee and as the Board of Directors of the Trustee shall from time to time, in its discretion, select and determine; provided, however, that no part of the net income or earnings of the trust property shall inure to the benefit of any member of The James Irvine Foundation, Trustee, nor shall any part thereof be used, applied or devoted to or for any other purpose than as hereinabove specified. Such income shall be used and applied by the Trustee, either by making donations or contributions to established charities exclusively engaged in the promotion of the purposes hereinabove mentioned, or by the establishment and/or support in whole or in part by the Trustee of charities devoted exclusively to the promotion of the same purposes, provided that all of such income shall

not be devoted to any one or two charities to the exclusion of others.

To carry out the express purpose of this trust and in aid of its execution and the proper administration, management and application of the trust property, the Trustee is vested, after the death of the Trustor, with the following additional powers and discretions:

1. To have, respecting the shares of stock hereinabove described and all other securities which may be held in this trust, all the rights, powers and privileges of an owner, including the voting thereof and giving proxies therefor; provided, however, that the Trustee shall have no power to and shall not, except only by the affirmative vote of all of the members of the Board of Directors of the Trustee, sell, encumber, or otherwise dispose of any of the shares of stock of The Irvine Company held by the Trustee under this trust, and shall hold, maintain and administer the same under this trust as a unit without division or segregation thereof.

2. As to any property which may hereafter be added to this trust, or any part thereof, (exclusive of the shares of stock of The Irvine Company): to manage, control, sell, convey, lease, partition, subdivide, exchange, improve and to encumber by mortgage, trust deed or otherwise the same, at such times and in such manner and in accordance with such procedure and on such terms as the Board of Directors of the Trustee may, in its discretion, deem advisable.

3. To invest, reinvest and keep invested the principal proceeds of the trust property and any accumulated income therefrom not used and applied as hereinabove

provided in any property or securities which the Trustee shall deem proper and advisable, whether or not permissible by law as investment for trust funds; provided that no part of the income therefrom shall be used or applied for any purpose other than as in this trust provided.

4. All discretions in this trust conferred upon the Trustee shall, unless specifically limited, be absolute and uncontrolled, and their exercise by the Board of Directors of the Trustee conclusive on all persons interested in this trust.

5. The powers and discretions of the Trustee enumerated herein are not to be construed as a limitation upon its general powers and discretions, but the Trustee and the Board of Directors thereof, as the same may from time to time be constituted, in addition thereto is hereby vested with and shall have, after the death of the Trustor and for the full duration of this trust thereafter, as to the trust property, the income therefrom, and in the execution of this trust, the same powers and discretions than an absolute owner of property has or may have, subject to the provisions and conditions of this trust.

Trustor hereby makes the following directions with respect to the management of the shares of stock of The Irvine Company and the property thereof, which consists for the most part of a land holding situated in Orange County, California: that inasmuch as the development and operation of said property has constituted the life work of the Trustor, it is the purpose of said Trustor, by the creation of this trust and by vesting in the

Trustee through its holding of said stock of The Irvine Company, the exercise of a controlling voice in the operation of its properties, to perpetuate the operation thereof and thus insure an adequate foundation for the charitable purposes herein provided. It is the Trustor's firm conviction that no other security could afford The James Irvine Foundation a more safe and stable investment than the capital stock of The Irvine Company, if this land holding is preserved and sustained at its present state of development, with such improvements, if any, as may be justified in the future. Portions of the land adjacent to and near the Pacific Coast and Newport Bay might from time to time be advantageously disposed of in various small parcels or units, and hill and unimproved property in larger units; but the great central valley acreage, together with such lands as are essential to the maintenance of the water supply thereto, should, in the judgment of the Trustor, be held and operated as a unit. The Trustor also cautions against disbursement of too large a part of the income or surplus of The Irvine Company. In furtherance of the policy heretofore established, liberal reserves of income must be accumulated and held for future needs and against unforeseen contingencies which have never yet failed to recur. For example, very large sums have already been expended out of accumulations of income in the construction of dams, the drilling of wells and installation of water distribution systems on and in the improvement of this property. Large expenditures will be required in the future to sustain and maintain such development and improvement.

The Trustor has no intention or desire to restrict the Trustee in its selection of the specific charities to be benefitted by this trust, nor to make any exclusive designation thereof. Nevertheless, the Trustor interprets the charitable purposes of The James Irvine Foundation as stated in its Articles of Incorporation to include financial aid generally to worthy individuals, who through illness or misfortune are temporarily in need. There is, for example, a very large body of selfrespecting citizens who are not wealthy enough to afford for their families and themselves that same high quality of medical and surgical and hospital care which is open to the wealthy and also the very poor. It is the desire and hope of the Trustor that The James Irvine Foundation may find a means of extending such temporary aid to as many as possible of these worthy individuals and families, and in so doing, that worthy citizens and families residing in Orange County, California, be not overlooked.

The Trustor also suggests that a revolving fund be created for loans not to exceed in the aggregate One Thousand ($1,000.00) Dollars per person, with very moderate rates of interest, to worthy students and scholars who are in need of financial aid to carry on their studies in institutions of learning in California, and also in moderate amounts to scientists or individuals engaged in research work who require financial assistance therein.

It is also the direction of the Trustor that charities receiving the substantial part of their support from taxation should not be beneficiaries of any of the prop-

erty derived from this trust, but that all such property, available from time to time for the benefit of charities, shall be used for such charities as do not enjoy any substantial support through taxation.

IN WITNESS WHEREOF, the Trustor has executed these presents on the day and year first hereinabove written, and the Trustee has also executed these presents at the same time by its officers thereunto duly authorized, in token of the acceptance by the Trustee of the trusts hereinabove set forth.

/s/ JAMES IRVINE

Trustor

THE JAMES IRVINE FOUNDATION

By /s/ MYFORD IRVINE

President

By /s/ E. M. PRICE

Secretary

Trustee

APPENDIX R

RECORDS OF CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO RE SAFE DEPOSIT BOX OF JAMES IRVINE, NO. 4416, AUTHORIZING HIS EMPLOYEES, MYFORD IRVINE AND EDNA M. PRICE AS HIS DEPUTIES AND AGENTS TO HAVE ACCESS THERETO

PRICE	CROCKER FIRST NATIONAL SAFE DEPOSIT VAULTS
$125	San Francisco, Cal., Dec. 15, 1928
TERM	I
	James Irvine

Have this day leased of CROCKER FIRST NATIONAL BANK of San Francisco, safe deposit box.... designated by number....on reverse of this card, for the term and price hereon set forth; said lease being subject to all "Terms and Conditions of Safe Rentals" as endorsed on rent receipt a copy of which has been delivered to me, I also acknowledge the receipt of 2 keys to said box.....

/s/ JAMES IRVINE

Remarks: .....

Name	Safe No.
Irvine, James	4416
Signature	**Date**
James Irvine	Jan. 2, 1929

Address 820 Crocker Bldg.

Age	Height Ft. In.	Weight	Eyes	Hair	Complexion

Special Marks

Signature

Address

Age	Height Ft. In.	Weight	Eyes	Hair	Complexion

Special Marks

CROCKER FIRST NATIONAL SAFE DEPOSIT VAULTS
SAN FRANCISCO, CALIFORNIA

CROCKER FIRST NATIONAL SAFE DEPOSIT VAULTS

Appointment of Deputy

San Francisco, Cal., Dec. 17, 1928

I hereby direct CROCKER FIRST NATIONAL BANK of San Francisco, to permit E. M. Price to have access to my safe....in the Safe Deposit Vaults of said Bank, until written notice to the contrary is given said Bank giving and granting unto said deputy full power and authority to do and perform, with reference to both withdrawing or changing from time to time the contents of said safe.... or in relation to any other thing pertaining thereto, including the surrender of said safe....and the keys thereof, all things which said Bank or its agents may deem necessary in and about the premises, as fully to all intents and purposes as.....might or could do, if personally present, hereby ratifying and confirming all that the said deputy shall do or cause to be done in and about the premises.

In witness whereof I have hereunto set my hand and seal at San Francisco this ..... day of .....A. D.

WITNESS:

.....

/s/ JAMES IRVINE [SEAL]

..... [SEAL]

San Francisco, Cal. ..... 19....

Above appointment of deputy ..... is hereby revoked.

.....

.....

Name	Safe No.
E. M. Price	4416

Deputy for

James Irvine

I accept the appointment as deputy made on the reverse side of this card and, as required by law, I hereby agree to notify said Bank of the death of any person having access to said safe, before seeking access thereto after the death of such person.

Signature

/s/ E. M. PRICE

Date

Jan. 2, 1929

Address

Age	Height Ft.	Height In.	Weight	Eyes	Hair	Complexion

Special Marks

Remarks

CROCKER FIRST NATIONAL SAFE DEPOSIT VAULTS
SAN FRANCISCO, CALIFORNIA

CROCKER FIRST NATIONAL SAFE DEPOSIT VAULTS

Appointment of Deputy

San Francisco, Cal., Dec. 17, 1928

I hereby direct CROCKER FIRST NATIONAL BANK of San Francisco, to permit Myford Irvine to have access to .....safe.....in the Safe Deposit Vaults of said Bank, until written notice to the contrary is given said Bank giving and granting unto said deputy full power and authority to do and perform, with reference to both withdrawing or changing from time to time the contents of said safe....or in relation to any other thing pertaining thereto, including the surrender of said safe....and the keys thereof, all things which said Bank or its agents may deem necessary in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that the said deputy shall do or cause to be done in and about the premises.

In witness whereof I have hereunto set my hand and seal at San Francisco this ..... day of .....A. D.

WITNESS:

.....

/s/ JAMES IRVINE [SEAL]

..... [SEAL]

San Francisco, Cal., ... 19....

Above appointment of deputy ..... is hereby revoked.

.....

.....

Name	Safe No.
Myford Irvine	4416

Deputy for

James Irvine

I accept the appointment as deputy made on the reverse side of this card and, as required by law, I hereby agree to notify said Bank of the death of any person having access to said safe, before seeking access thereto after the death of such person.

/s/ MYFORD IRVINE

Date Jan. 2, 1929

Address

Age	Height Ft.	In.	Weight	Eyes	Hair	Complexion

Special Marks

Remarks

CROCKER FIRST NATIONAL SAFE DEPOSIT VAULTS
SAN FRANCISCO, CALIFORNIA

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IN THE

Supreme Court of the United States

October Term, 1968
No. 1167

ATHALIE IRVINE SMITH,

Petitioner,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, *et al.*,

Respondents.

On Petition for a Writ of Ceritorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Respondents The James Irvine Foundation, Et al., in Opposition.

This case involves an *inter vivos* trust for charitable purposes established under the laws of the State of California in the year 1937 by a written Indenture of Trust between James Irvine, as trustor, and respondent The James Irvine Foundation, as trustee. The Foundation administered the trust for almost three decedes before this action was filed in August, 1966. During that period, approximately 6.5 million dollars of trust income was distributed to California charities in accordance with the provisions of the Indenture of Trust. The petitioner (plaintiff and appellant below) is a granddaughter of the trustor and seeks by this action to invalidate the trust and to recover the trust property, which consists of a majority of the stock of The Irvine Company, for herself and the other beneficiaries of the trustor's estate.

Jurisdictional Statement.

The United States District Court for the Central District of California had jurisdiction in this cause under the provisions of 28 U.S.C. § 1332 by virtue of an Amended Complaint for the recovery of personal property exceeding the value of $10,000.00, exclusive of interest and costs, which shows diversity of citizenship between petitioner and respondents [Clk. Tr. p. 4]. A final judgment in favor of respondents and against petitioner was entered in the District Court on December 18, 1967 (277 F. Supp. 774; Pet. App. B, p. 48).

Jurisdiction was conferred on the United States Court of Appeals for the Ninth Circuit under the provisions of 28 U.S.C. § 1291 by virtue of a Notice of Appeal filed on behalf of petitioner on December 18, 1967 [Clk. Tr. p. 187]. The judgment of the Court of Appeals, which affirmed the District Court's judgment, was filed and entered October 14, 1968 (402 F. 2d 772; Pet. App. A, A1, pp. 40, 45). Petitioner's application for a rehearing was denied December 18, 1968 (Pet. App. A2, A3, pp. 46-47).

The Petition for a Writ of Certiorari was filed March 18, 1969. It invokes the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

Defects and Deficiencies of Petition.

Preliminarily, it should be noted that the Petition fails to conform to the requirements of the Rules of this Court in the following important respects:

1. The Petition does not, and indeed could not, set forth "special and important" reasons as specified in

Rule 19 for a review of the decision of the Court of Appeals by this Court. No question of federal law and no important question of state law was decided by the Court of Appeals; nor is its judgment in conflict with a decision of this Court or of another Court of Appeals. The California law applicable to the issues in the case is well settled by numerous prior decisions of the state appellate courts and was clearly followed in deciding each of petitioner's contentions. Moreover, there is nothing new, special or important (except to the parties) about any of the issues. They involve, in the main, rather ordinary questions of fact which were decided by the District Court in the usual course of judicial proceedings. The full record was reviewed in the Court of Appeals and the findings were affirmed by a routine application of well established principles of judicial review under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. The issues decided by the Court of Appeals have no application beyond this case and present no reason for an exercise of this Court's jurisdiction.

2. The Petition fails to present accurately or clearly the facts essential to a ready and adequate understanding of the points submitted for consideration as required by paragraph 4. of Rule 23. The Petition reiterates the twice rejected arguments and contentions asserted on behalf of petitioner in the lower courts and omits the material evidence and findings of fact. Moreover, petitioner's arguments that the findings of the courts below are "clearly erroneous" (Pet. pp. 9-39) are not presented in terms of the evidence as a whole, but are based upon inaccurate characterizations and erroneous inferences drawn from selected bits of testi-

mony and fragments of various documents without reference to the great mass of substantial evidence in the record on which the District Court and the Court of Appeals made their findings.

3. It is apparent that the Petition fails to conform to the requirements of subparagraphs (c) and (e) of paragraph 1. of Rule 23 with respect to the statement of the questions presented for review and the statement of the case.

The foregoing defects and deficiencies of the Petition should constitute, without more, a sufficient reason for denial of the requested Writ of Certiorari.

Questions Presented.

For the reasons explained above, the questions stated in the Petition are inaccurate and misleading. The only questions actually presented by the Petition are the following:

1. Whether the Court of Appeals erred in denying petitioner's application for a rehearing, in which petitioner contended that the District Court failed to order the joinder of an indispensable party to the action under the provisions of Rule 19 of the Federal Rules of Civil Procedure.

2. Whether the Court of Appeals erred in holding that the forty-one findings of facts challenged by petitioner on appeal are not "erroneous—clearly or otherwise."

3. Whether the Court of Appeals erred in holding that the California law was correctly applied in the District Court's finding that the subject trust is limited to solely charitable uses and purposes and therefore is exempt from the California rule against perpetuities.

Statement of the Case.

The thoroughness and accuracy with which the evidence is presented in the District Court's Memorandum opinion (Pet. App. B, pp. 48-111) make it unnecessary to include a detailed review of the facts in this statement of the case. However, the following summary is submitted to correct the inaccuracies and misleading omissions in petitioner's statement and to assist the Court in identifying the various parties and transactions and their relationship to one another.

Descendants of James Irvine—Parties to the Action.

James Irvine (referred to herein as Mr. Irvine) was born in 1867 and died in 1947. When Mr. Irvine died, his only surviving child was Myford Irvine. He was also survived by his wife Katharine Brown Irvine and by three granddaughters; Athalie Anita Smith (petitioner herein), the only child of his predeceased son James, Jr.; Kate L. Wheeler (a respondent herein), the only child of his predeceased daughter Kathryn Helena; and Linda Irvine Gaede (a respondent herein), the then only child of his surviving son Myford. Katharine Brown Irvine and Myford Irvine having died prior to

the commencement of this case in 1966, the executors of their respective estates were joined in the action as parties defendant.

The District Court found that all of the persons having an interest in Mr. Irvine's estate had been joined as parties to the action (Pet. App. B, p. 56). Petitioner did not challenge this finding on her appeal to the Court of Appeals. However, the absence of an indispensable party was one of the grounds urged by petitioner for a rehearing in the Court of Appeals. Petitioner contended there, as she does here, that James Myford Irvine is an heir at law of Mr. Irvine's estate and should have been joined in the action.

James Myford Irvine is the son of Myford Irvine, deceased, and Gloria Wood Irvine (a respondent herein as one of the executors and trustees of Myford Irvine's estate). He was not born until six years after Mr. Irvine's death and therefore, could not be one of Mr. Irvine's heirs at law. The Petition also erroneously states that James Myford Irvine is a testamentary beneficiary of Mr. Irvine's estate (Pet. p. 6). No provision is made for him in Mr. Irvine's last Will [Ex. B] or in the Decree of Final Distribution entered in Mr. Irvine's estate by the California probate court [Ex. B-28]. Accordingly, James Myford Irvine has no interest in Mr. Irvine's estate and petitioner's application for a rehearing in the Court of Appeals was denied.

The James Irvine Foundation—The Charitable Trust.

The James Irvine Foundation is a California corporation. It was organized by Mr. Irvine for charitable purposes under the California non-profit corporation laws in the year 1937. Its Articles of Incorporation

which were filed on January 6, 1937, provide *inter alia:*

> "That this corporation, is formed solely for charitable purposes, namely, public welfare, health, education, comfort, happiness and general well being, particularly of the citizens and residents of the State of California, or any part thereof, and that this is a corporation which does not contemplate pecuniary gain or profit to the members thereof. . . ." [Ex. A].

There were seven members and directors of the Foundation, of which only two were members of Mr. Irvine's family: his son Myford Irvine and his wife Katharine Brown Irvine. At the first meeting of directors held on February 1, 1937, Myford Irvine was elected president, Paul A. Dinsmore was elected vice-president and E. M. Price was elected secretary and treasurer [Ex. A-14, pp. 24-25]. Mr. Irvine was never a member, director, or officer of the Foundation [Rep. Tr. p. 78].

By an Indenture of Trust dated February 24, 1937, and executed by Mr. Irvine, as trustor, and by Myford Irvine and E. M. Price on behalf of the Foundation, as trustee, Mr. Irvine transferred, assigned and conveyed to the Foundation 505 shares of the capital stock of The Irvine Company, together with certain other stock and stock interests to be held in trust for charitable uses and purposes. Under the terms of the Indenture, Mr. Irvine reserved to himself a life estate interest in the stock transferred to the Foundation, including the right to receive the dividends and certain capital distributions and the right to vote the stock during his lifetime. He also retained the power to add

other property to the corpus of the trust and to revoke the trust in whole or in part or to withdraw from the trust all or any part of the trust property "by written instrument filed with the Trustee" [Ex. A-1].

At the next regular meeting of directors of the Foundation held on May 25, 1937, a resolution was adopted, which "ratified, approved, confirmed and adopted" the "acts and deeds of Myford Irvine as President and E. M. Price as Secretary . . . in executing for and in behalf of . . . this corporation, that certain Indenture of Trust . . . and in accepting the trusteeship created by and under said Indenture of Trust and also in *accepting delivery for and in behalf of this corporation as trustee under said Indenture of Trust, of the certificates of stock described in said Indenture of Trust, to-wit 505 shares of the capital stock of The Irvine Company* . . ." (Emphasis added). The resolution also provided that the "corporation does hereby expressly accept said trusteeship and acknowledges and declares *that it holds said shares of stock and the certificates evidencing same, respectively* . . . as Trustee under said Indenture of Trust and subject to all the rights and obligations of Trustee thereunder." (Emphasis added) [Ex. A-14, p. 31].

By letter dated June 20, 1946, Mr. Irvine exercising the powers reserved to him in the 1937 Indenture of Trust, transferred an additional five shares of stock of The Irvine Company to the Foundation as an addition to the corpus of the trust [Ex. A-13]. At the regular meeting of directors of the Foundation held on June 26, 1946, a resolution was adopted accepting "said five shares of stock of The Irvine Company . . . as an addition to the trust property." [Ex. A-14, p. 109].

Mr. Irvine's life estate interest in the trust property terminated by his death on August 24, 1947. A special meeting of directors of the Foundation was held on September 19, 1947, at which the following resolution was adopted:

> "RESOLVED, that the President and Secretary of this corporation be and they hereby are authorized and directed to take all steps and to do and perform all things, for and on behalf of this corporation, that may be necessary to cause the certificates of the capital stock of The Irvine Company, heretofore transferred to and now held by this corporation, to be transferred on the books of The Irvine Company and new certificates representing such shares to be issued in the name of this corporation." [Ex. A-14, p. 121].

On November 18, 1947, said 510 shares of stock of The Irvine Company were transferred on the books of the Company from the name of James Irvine to The James Irvine Foundation and a new certificate for the stock was issued to the Foundation [Rep. Tr. pp. 79-80].

In 1963, The Irvine Company redeemed 10% of its outstanding stock in a partial liquidation, leaving the Foundation with a total of 459 shares [Ex. D]. These are the shares which are the subject of petitioner's action.

Proceedings in the Courts Below.

All of petitioner's contentions of fact and legal theories were fully tried and examined in the District Court. Almost 4000 pages of oral testimony was taken, 297 documents were received in evidence and extended post trial briefs of fact and law were filed on behalf

of petitioner and the respondents. The evidence and petitioner's contentions as to the facts are reviewed in considerable detail, together with the applicable California authorities, in the District Court's Memorandum opinion, which also sets forth its findings of fact, conclusions of law and order for judgment (277 F. Supp. 774 (1967); Pet. App. B, p. 48).

In summary, the District Court found:

1. That the executed Indenture of Trust and Mr. Irvine's letter of June 20, 1946, were delivered to the Foundation by Mr. Irvine and thereafter retained by the Foundation;

2. That the delivery of the Indenture of Trust and June 20, 1946 letter effected a present transfer of the subject 510 shares of Irvine Company stock in trust to the Foundation, subject only to being divested by the exercise by Mr. Irvine of his power of revocation;

3. That following execution of the Indenture of Trust and June 20, 1946 letter, Mr. Irvine endorsed in blank the certificates described in those instruments and delivered them to the Foundation and that thereafter during the lifetime of Mr. Irvine the Foundation had in its possession certificates endorsed in blank representing the subject 510 shares of Irvine Company stock;

4. That the delivery of the certificates endorsed in blank effected a present transfer of the subject 510 shares of Irvine Company stock to the Foundation in trust subject only to being divested by the exercise by Mr. Irvine of his power of revocation;

5. That the Indenture of Trust established a valid *inter vivos* trust and not a mere agency and that the

Indenture and Mr. Irvine's June 20, 1946 letter effected an *in praesenti* transfer of the subject stock, which was not testamentary in character; and

6. That the trust established by the Indenture is limited to solely charitable uses and purposes and is valid under the California law exempting charitable trusts from the rule against perpetuities.

Petitioner challenged the findings on appeal and the Court of Appeals "after thoroughly examining the voluminous record" and having "carefully reviewed the decision in the full light of [petitioner's] vigorous and broadly-based assault upon it" found no error and affirmed the decision of the District Court (402 F. 2d 772, 774; Pet. App. A, pp. 42-43).

ARGUMENT.

I.

The Decision That James Myford Irvine Is Not an Indispensable Party Raises No Special or Important Question and Is Correct.

Petitioner bases her contention that James Myford Irvine is an indispensable party on the undocumented assertion that he is an heir at law of Mr. Irvine and a testamentary beneficary of his estate. It is clear from the record, however, that he occupies neither capacity and that in his own right he has no interest in Mr. Irvine's estate.

James Myford Irvine is not and could not have been an heir at law of Mr. Irvine because he was not born until 1953 which was six years after the death of Mr. Irvine. Under California law, the heirs at law of a decedent, that is the persons entitled to succeed to property that passes by intestate succession, are fixed and determined as of the date of the decedent's death and the title to such property vests in the heirs *eo instante* at the time of the death. Calif. Probate Code § 300; *United States F & G Co. v. Matthews,* 207 Cal. 556, 279 Pac. 655 (1929); *Estate of Liddle,* 162 Cal. App. 2d 7, 328 P. 2d 35 (1958); *Estate of Prior,* 111 Cal. App. 2d 464, 244 P. 2d 697 (1952).

James Myford Irvine is the son of Myford Irvine and respondent Gloria Wood Irvine. If Mr. Irvine had owned any property that was not disposed of by his will (which is not possible in any event as will appear

hereinafter), the title to such property under the California laws of intestate succession would have vested in Myford Irvine, his only surviving child, and by right of representation, in respondent Kate L. Wheeler and the petitioner, who were the only then living issue of his two predeceased children. Calif. Probate Code §§ 200-231; *Kunakoff v. Woods,* 166 Cal. App. 2d 59, 332 P. 2d 773 (1958).

It is equally certain that James Myford Irvine is not a testamentary beneficiary of Mr. Irvine's estate. Mr. Irvine's Last Will and Testament [Ex. B] and the Decree of Final Distribution [Ex. B-28] entered in his estate by the California probate court, clearly establish that James Myford Irvine has no interest in any property right which Mr. Irvine may have had at the time of his death. In accordance with the provisions of the Will, the Decree of Final Distribution transferred all of the property, known and unknown, which Mr. Irvine was entitled to dispose of at the time of his death, to persons other than James Myford Irvine. The Decree, after distribution of the known property, ordered that "any other property not now known or discovered which may belong to said estate of decedent or in which said estate may have an interest" be distributed one-eighth to Myford Irvine and seven-eights to the trustees of trusts established by the Will for the benefit of persons other than James Myford Irvine. The Decree having become final is conclusive as to the rights of all heirs, devisees and legatees and is not subject to collateral attack in this case. Calif. Probate Code § 1021; *Cook v. Cook,* 17 Cal. 2d 639, 652, 111 P. 2d 322, 330 (1941).

If for any of the reasons alleged in petitioner's Amended Complaint, Mr. Irvine's gifts of stock to the

Foundation in trust had been invalid, the stock would have been the property of Mr. Irvine at the time of his death. In that event the stock would have passed under the quoted provision of the Decree of Final Distribution: seven-eighths to the testamentary trusts and one-eighth to Myford Irvine. *Estate of Heigho,* 186 Cal. App. 2d 360, 9 Cal. Rptr. 196 (1960); *Latta v. Western Inv. Co.,* 173 F. 2d 99 (9th Cir. 1949).

The only interest that James Myford Irvine could have in this case is as an heir or beneficiary of the Will of Myford Irvine, who died in 1959. However, by statute in California, the estate of Myford Irvine, rather than James Myford Irvine as an individual beneficiary of the estate, is the proper party to represent and recover any property interest that could have passed to Myford Irvine as a beneficiary of Mr. Irvine's estate. Calif. Probate Code § 1023; *Holland v. McCarthy,* 177 Cal. 507, 509, 171 Pac. 421, 422-23 (1918); *Rogers v. Bank of America,* 140 Cal. App. 2d 228, 294 P. 2d 959 (1956). The estate of Myford Irvine was made a party to this action on motion of the Foundation, by the joinder of Gloria Wood Irvine and Security Pacific National Bank as the executors and trustees of the estate.

Petitioner correctly notes that Myford Irvine's daughter, respondent Linda Irvine Gaede, was also joined in the action on the motion of the Foundation, but erroneously concludes that her joinder was as an heir at law of James Irvine. To the contrary, she was joined and is a proper party to the action because she, unlike James Myford Irvine, is one of the beneficiaries of the residue of Mr. Irvine's estate under the terms of his will.

II.

The Decision That the District Court's Findings of Fact Are Not Erroneous Raises No Special or Important Question and Is Correct.

It is apparent from the opinion of the Court of Appeals that it correctly applied the ordinary and well settled rules applicable to judicial review of findings of fact under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. Petitioner's assertion that the Court of Appeals' decision is in conflict with the decision of this Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525 (1948), is, of course, not true (Pet. pp. 36-37). The Court of Appeals quoted and applied the rule of the *Gypsum* case in reaching its decision that the findings of fact in this case are not erroneous. In the words of the opinion of the Court of Appeals:

> ". . . [A] finding is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).
>
> * * * *
>
> "In our view, appellant has failed to carry her burden in this respect, for after considering her assertions and after thoroughly examining the voluminous record in this appeal, we are far from a 'definite and firm conviction that a mistake has been committed.' To the contrary, we are not in the slightest convinced that the district court's findings are erroneous—clearly or otherwise; consequently, those findings will not be disturbed." (402 F. 2d 772, 774; Pet. A, pp. 42-43).

Petitioner's argument that the District Court's findings are clearly erroneous is, in substance, that the limited portions of the evidence upon which she relies are entitled to greater weight than the evidence that was accepted by the District Court in making its findings. There is no merit in petitioner's argument, as is set forth in detail in the Memorandum opinion of the District Court, but it is sufficient here to note that the argument cannot aid the petitioner in her contention that the findings are "clearly erroneous". When confronted with a similar argument in *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S. Ct. 177, 179, (1949), this Court held:

> ". . . [T]he [appellant] has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. *Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'.*" (Emphasis added).

No attempt has been made by petitioner to evaluate the District Court's findings in terms of the evidence as a whole or to consider the evidence in the light that is most favorable to the prevailing parties. To the contrary, petitioner has ignored most of the material evidence. Her contention that consistent findings of two lower courts should be reviewed by this Court is based upon selected bits of testimony and fragments of various documents which, at the most, show that there was a conflict in the evidence. It is too clear for argument that petitioner's burden in this Court cannot be sustained by such a showing. *Berenyi v. District Director, Imm.*

& Nat. Serv., 385 U.S. 630, 635-636, 87 S. Ct. 666, 670 (1967); *United States v. O'Donnell*, 303 U.S. 501, 508, 58 S. Ct. 708, 713 (1938).

III.

The Decision That the Trust Is Limited to Solely Charitable Uses and Purposes and Is Exempt From the California Rule Against Perpetuities Raises No Special or Important Question and Is Correct.

The provisions of the Indenture of Trust [Ex. A-1; Pet. App. Q], as well as the Foundation's Articles of Incorporation [Ex. A], in direct and mandatory language limit the beneficiaries of the trust to charities. The Indenture provides that the proceeds of the trust property shall "be used, applied, and devoted by the trustee *exclusively* to or for the advancement of any charitable use or purpose in the State of California . . ." (Emphasis added) [Ex. A-1, p. 5; Pet. App. Q, p. 173]. Such trusts are specifically exempted by the Constitution of California from the operation of rules against perpetuities. Article XX, Sec. 9 of the Constitution of California, *Dingwell v. Seymour*, 91 Cal. App. 483, 267 Pac. 327 (1928); *Estate of Conner*, 158 Cal. App. 2d 187, 322 P. 2d 616 (1958); *Estate of McKenzie*, 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964).

Petitioner's assertion that under the terms of paragraphs 2, 3 and 4 of the Indenture of Trust, "it is possible that the trustee may, in its uncontrolled discretion, devote the whole or a part of the income received from the trust property . . . to private use" (Pet. p. 34), is based on patent errors of both fact and law. Neither the cited paragraphs nor any of the other provisions

of the Indenture permit the trustee to use trust income for non-charitable purposes. Paragraphs 3 and 4 simply provide the trustee with discretion with respect to the investment of the capital of the trust [Ex. A-1, pp. 6-7; Pet. App. Q, pp. 174-175]. Paragraph 2 is an ordinary accumulation provision which authorizes the trustee in its sound discretion to add income to the capital of the trust and requires that all income from such additions to capital shall be subject to the same restriction to charitable uses as the proceeds from the original capital of the trust [Ex. A-1, pp. 4-5; Pet. App. Q, p. 173]. The discretionary power to accumulate trust income, like all other powers vested in the trustee, is subordinate to the charitable purpose of the trust and must be exercised by the trustee in a manner that will further that purpose. *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 844, 850, 264 P. 2d 539, 542 (1953); *House of Rest v. County of Los Angeles*, 151 Cal. App. 2d 523, 528, 312 P. 2d 392, 395 (1957).

Moreover, under California law, as elsewhere, accumulation provisions are not subject to rules against perpetuities. Rather, they are subject to judicial supervision. If the trust instrument requires accumulations that are unreasonable or if a trustee that has discretion to accumulate income does so to an unreasonable extent, the court may order the distribution of the income or otherwise restrict the amount of the accumulation.

In no event does a provision authorizing or directing the accumulation of income as an addition to the trust capital operate to invalidate the trust. In *Estate of McKenzie*, 227 Cal. App. 2d 167, 38 Cal. Rptr. 496 (1964), the California Court of Appeals so held with

the succinct statement that accumulations in charitable trusts are subject to judicial supervision and do not affect "the *existence* or the *validity* of the trust itself." (Emphasis added).

The unsupported assertion in the Petition that the accumulation provision of the Indenture of Trust renders the trust invalid under the rule against perpetuities (Pet. p. 33) is erroneous under California law even with respect to private trusts. Calif. Civil Code § 725; *In re Yates Estate,* 170 Cal. 254, 149 Pac. 555 (1915).

Petitioner's reliance on *Estate of Sutro,* 155 Cal. 727, 102 Pac. 920 (1909); *Estate of Kline,* 138 Cal. App. 514, 32 P. 2d 677 (1934); *Estate of Peabody,* 21 Cal. App. 2d 690, 70 P. 2d 249 (1937); and *Estate of Vance,* 118 Cal. App. 163, 4 P. 2d 977 (1931), to support her contention that the accumulation provision in the Indenture of Trust renders the trust invalid (Pet. pp. 34-35), is badly misplaced. Those cases do not deal with, nor even discuss, the question of accumulation of income in charitable trusts. Rather, the issue before the court in each case was whether the trustee was required by the terms of the trust instrument to limit the beneficiaries of the trust to solely charitable organizations and causes.

Here we are not concerned with that question since the provisions of the Indenture of Trust in direct and mandatory language limit the beneficiaries of the trust to charities and require that the proceeds of the trust property "be used, applied and devoted by the trustee *exclusively* to or for the advancement of any charitable use or purpose in the State of California."

Conclusion.

The decision of the Court of Appeals raises no federal question and presents no "special or important" reason for an exercise of this Court's jurisdiction. Moreover, the decision of the Court of Appeals was manifestly correct in affirming the judgment of the District Court and in denying petitioner's application for a rehearing.

We respectfully submit that the Petition For a Writ of Certiorari should be denied.

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SUPREME COURT, U. S.

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To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Is James Myford Irvine an heir or testamentary beneficiary of James Irvine?

2. Was James Myford Irvine an "indispensable party" within the meaning of Federal Rule of Civil Procedure 19, so that it was error for the Court of Appeals to deny plaintiff-appellant's petition for rehearing?

3. Were the findings of fact of the District Court "clearly erroneous"?

STATEMENT

Petitioner, plaintiff below, did not make a motion in the District Court under Federal Rule of Civil Procedure 19 to have James Myford Irvine joined as an indispensable party, nor did she move in the District Court to dismiss the action for failure to join an indispensable party, to wit, James Myford Irvine. Apparently, plaintiff's only reference in the District Court to joinder of necessary or indispensable parties was at page 16 of the "Reply of Plaintiff to Answer of All Defendants to Amended Complaint Except The Irvine Company, a Corporation":

> "The plaintiff has heretofore indicated to the court that the plaintiff has no objection to the joining in this action of any parties whose interests are involved in said action and may be affected by any judgment entered herein and who appear to the court to be necessary or indispensable parties to this action as provided in Rules 19 and 21 of the Federal Rules of Civil Procedure whenever the court shall determine of its own motion that said parties, whoever they may be, shall be so joined."

Plaintiff's first mention of James Myford Irvine as an indispensable party was when she petitioned the Court of Appeals for rehearing, alleging *inter alia* that he was an indispensable party and, therefore, the judgment of the Court of Appeals should have been vacated, the judgment of the District Court reversed and a new trial ordered.

ARGUMENT

I

JAMES MYFORD IRVINE WAS NOT AN INDISPENSABLE PARTY

Plaintiff's first and most important argument in support of her petition for a writ of certiorari is that an indispensable party, James Myford Irvine, was not joined and that, therefore, the judgment of the District Court and the affirmance of the Court of Appeals should be reversed and a new trial ordered. Her reasoning apparently is that there was a possibility judgment would be rendered in her favor, which would mean the share of James Irvine's estate which passed to Myford Irvine would have to be recomputed and redistributed, that because Myford Irvine was deceased his children would take his share, and because one of the children, to wit, James Myford Irvine, was not joined as a defendant, the District Court was without jurisdiction. This argument is faulty for several reasons: James Myford Irvine is not an heir or testamentary beneficiary of James Irvine; and, even if he were, he is not such an "indispensable party" under Federal Rule of Civil Procedure 19 as to require reversal of the judgment below.

A

JAMES MYFORD IRVINE IS NOT AN HEIR OR TESTAMENTARY BENEFICIARY OF JAMES IRVINE, NOR DOES HE TAKE BY RIGHT OF REPRESENTATION FROM JAMES IRVINE

Under California law, if a trust is declared invalid, the trust corpus reverts to the grantor or settlor, here

James Irvine. *E.g., Mallon v. City of Long Beach,* 44 Cal.2d 199, 208, 282 P.2 481 (1955); *Ruddick v. Albertson,* 154 Cal. 640, 643, 98 Pac. 1045 (1908); *Estate of Johnston,* 47 Cal.2d 265, 270, 303 P.2d 1 (1956); *Estate of Whitney,* 176 Cal. 12, 18, 167 Pac. 399 (1917); *Booge v. Reinicke,* 45 Cal.App.2d 260, 265, 114 P.2d 427 (1941). If the settlor died testate, the corpus is then distributed under the residuary clause of his will, if any. *Estate of Feldman,* 78 Cal.App.2d 778, 790, 178 P.2d 498 (1947). Otherwise, the corpus of the void trust is distributed by the laws of intestate succession. *Estate of Ralston,* 1 Cal.2d 724, 726, 37 P.2d 76 (1934); *Sears v. Rule,* 27 Cal.2d 131, 140, 163 P.2d 443 (1945) cert. den. 328 U.S. 843; *Hansen v. Bear Film Co.,* 28 Cal.2d 154, 172-73, 168 P.2d 946 (1946); *In re Walkerly,* 108 Cal. 627, 660, 41 Pac. 772 (1895); *Estate of Whitney, supra.*

The trust was held valid. If it had been held void, the corpus would have passed under the residuary clause of James Irvine's will. See cases cited, *supra.* The residuary clause of the will does not mention James Myford Irvine because he was born six years after the testator died. The will does state that the children of Myford Irvine would take his share by right of representation if certain grandchildren of James Irvine predeceased other grandchildren and left no issue then surviving. At the time of testator's death, all those grandchildren were alive. At the time of trial, all were alive and had issue surviving. The will of James Irvine provides that with such persons living at the time of his death, the residue of his estate shall be distributed to certain persons, but not

to the children of Myford Irvine by right of representation. This provision of the will is given effect by Section 300 of the California Probate Code:

> "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will. . . ."

In Appendix "E" of her petition plaintiff cites authority for the proposition that James Myford Irvine took from James Irvine by right of representation. A careful reading of the opinions cited indicates they are not in point. They only *define* the nature of the right of representation. They do not state when a party is *entitled* to take by right of representation. *Estate of Meyer,* 107 Cal.App.2d 799, 238 P.2d 597 (1951), does not discuss right of representation at all. It merely discusses the rights of heirs in general. Id. at 810. *Estate of Berk,* 196 Cal.App.2d 278, 16 Cal.Rptr. 492 (1961), first noted that a particular section of the California Probate Code, not applicable in the instant case, provided that the party took by right of representation, and then discussed the nature of that right. Id. at 281. In *Maud v. Catherwood,* 67 Cal.App.2d 636, 155 P.2d 111 (1945), testator's will provided that his heirs would take by right of representation. Id. at 638, 642. *Estate of Healy,* 176 Cal. 244, 168 Pac. 124 (1917), and *Lombardi v. Blois,* 230 Cal.App.2d 191, 40 Cal.Rptr. 899 (1964), are the same as *Maud v. Catherwood*: The will provided the heirs would take by right of representation.

It thus appears that the premise on which plaintiff bases her conclusion that James Myford Irvine was an indispensable party is false. James Myford Irvine is not an heir of James Irvine, James Myford Irvine was not a testamentary beneficiary of James Irvine, and James Myford Irvine did not take from James Irvine by right of representation.

If the trust had been held void, the proper parties to take the recomputed share of Myford Irvine in the estate of James Irvine were Gloria Wood Irvine and Security Pacific National Bank as executors of Myford Irvine's estate. Section 1023 of the California Probate Code provides that "If an heir, devisee or legatee dies before the distribution to him of his share of the estate, such share may be distributed to the representative of his estate. . . ." See *Holland v. McCarthy,* 177 Cal. 507, 509, 171 Pac. 421 (1918); *Rogers v. Bank of America,* 140 Cal.App.2d 228, 232, 294 P.2d 959 (1956). Gloria Wood Irvine and Security Pacific National Bank were joined as Executors of the Estate of Myford Irvine, as well as trustees of the testamentary trusts created by him. If any more property had come into Myford Irvine's estate, they would have distributed it. James Myford Irvine would be an indispensable party to any lawsuit pertaining to *that* distribution, as he is named in his father's will.

EVEN IF JAMES MYFORD IRVINE WERE AN HEIR OR BENEFICIARY, HE WAS NOT THE KIND OF INDISPENSABLE PARTY WHOSE ABSENCE WOULD REQUIRE A REVERSAL OF THE LOWER COURT JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 19

As noted in the statement of the case in this brief, plaintiff did not make any contention or motion concerning James Myford Irvine as an indispensable party until her petition for rehearing in the Ninth Circuit. The procedure to be followed when deciding whether a trial court judgment entered after an extensive trial (which in the instant case lasted many weeks) should be reversed and vacated on the ground that an indispensable party was not joined is set forth in *Provident Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968).

Applying this procedure to the instant case, it seems plain there was no error on the part of the Ninth Circuit Court of Appeals in denying plaintiff's petition for rehearing. Federal Rule of Civil Procedure 19(b) sets out interests that should be examined to determine whether, in equity and good conscience, the lower court verdict should be reversed because James Myford Irvine was not joined. 390 U.S. at 109; Federal Rule of Civil Procedure 19. The factors which seem most relevant here are: First, the extent to which the judgment entered in James Myford Irvine's absence is prejudicial to him or to those who were parties; second, the interest of the courts and the public in a complete, consistent and efficient settlement of controversies. 390 U.S. at 109-11; Federal Rule of Civil Procedure 19. These

factors must be considered in light of judgment, binding on the parties although not binding on James Myford Irvine, having been reached after extensive litigation. 390 U.S. at 109.

In this lengthy case, the District Court entered a judgment which held that the trust of James Irvine was valid. The effect of this was to preserve the status quo exactly as it was prior to the lawsuit. Therefore, the interests of James Myford Irvine, as well as everyone else involved, were not changed or affected in any way. Plaintiff now sets forth the argument that because there was a possibility the interests of James Myford Irvine *could* have been affected if the judgment had gone the other way, the District Court judgment must be reversed and vacated and a new trial held with James Myford Irvine joined. It is now too late for plaintiff to make this argument. Id. at 116.

II

THE FINDINGS OF FACT IN THE DISTRICT COURT WERE NOT CLEARLY ERRONEOUS

Plaintiff's arguments set forth at pages 11 through 35 of her petition, that is, that there was no delivery of the trust instrument, that James Irvine exerted acts of ownership over the Irvine stock during his lifetime, that The Irvine Foundation did not exert ownership or control over the stock during the lifetime of James Irvine, and that the trust had charitable and non-charitable purposes, are basically complaints that the District Court findings of fact were decided adversely to her. Plaintiff must show that the findings themselves were clearly erroneous. Federal Rule of Civil Procedure 52(a); *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956); *International Boxing Club, Inc. v. United States*, 358 U.S. 242 (1959). This she has not done.

CONCLUSION

Under the laws of the State of California, James Myford Irvine is not an heir or testamentary beneficiary of James Irvine. The proper party defendants to this lawsuit were *inter alia* the Executors of the Estate of Myford Irvine, his father. Plaintiff's contention James Myford Irvine is an indispensable party is plainly wrong.

For the foregoing reasons, it is respectfully submitted the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER ATHALIE IRVINE SMITH TO BRIEF OF RESPONDENTS THE JAMES IRVINE FOUNDATION, ET AL., IN OPPOSITION TO PETITION

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I

The 4,000 pages of oral testimony and the 297 documents received in evidence referred to by the respondent Foundation at page 9 of its brief were made up of about seventy percent of the oral testimony and about ninety percent of the documentary exhibits that were introduced by respondent Foundation to support its affirmative

defenses that the petitioner's action was barred by the statute of limitations, res judicata, laches and estoppel. The Court is further advised that the reason for the size of the reporter's transcript in this case was because the proceeding in the District Court was a deposition hearing under the judicial supervision of Honorable Henry N. Graven, Senior District Judge from the Northern District of Iowa, by assignment. The proceeding before Judge Graven was not a formal trial where the rules of evidence were applied. There never was a trial, as the case was submitted on the depositions for the decision of Judge Graven on the sole issue of whether or not the trust was valid or void. The Memorandum and Decision of the District Court Judge expressly stated that the affirmative defenses of the respondent Foundation, based on the statute of limitations, res judicata, laches and estoppel, were not before the Court for its decision and therefore were not considered.

In order to pinpoint the crucial findings of the District Court which are clearly erroneous when considered in the light of the substantial documentary evidence in the case, the petitioner will refer in this Reply Brief to the brief of the respondent Foundation to said findings in the order in which they appear in the Memorandum and Decision of the District Court, which commenced at page 88 of the Petition as follows:

[1] "The first issue for determination is the issue as to the delivery of the Indenture. The signed acceptance of the Foundation of the trusteeship established by the Indenture appears on the Indenture. The Indenture was

not found in the safety deposit boxes of James Irvine following his death. There is lacking any evidence showing possession of the Indenture by James Irvine following its execution. The only possession of it following its execution, as shown by the evidence, was the possession of the Foundation shortly following his death."

There was no evidence, either oral or documentary, introduced by the respondent Foundation which established the physical delivery, as required by law, of the Indenture by James Irvine to any person or entity, including Myford Irvine or E. M. Price. O'Branovich v. Stiller, 34 Cal. Rptr. 923. The finding of the District Court that the signed acceptance by the Foundation of the trusteeship established by the Indenture appears on the Indenture is clearly erroneous. The only signatures on the Indenture are those of James Irvine, the trustor, and his son and employee and agent, Myford Irvine, who held the office of president of the Foundation, as the employee and agent of his father and who at all times, both before and after February 24, 1937, until the death of his father on August 24, 1947, was in the exclusive employ of his father as a clerk in his father's office. He acted as the "tool" and "dummy" for his father as the president of his father's corporation, known as The James Irvine Foundation. The third signature on the Indenture was that of E. M. Price, who, like Myford Irvine, was in the exclusive employ of James Irvine from 1917 and until his death on August 24, 1947, as his stenographer and secretary. Miss Price, like Myford Irvine, was placed by her employer, James Irvine, in the office of secretary of the respondent Foundation to act as his "tool" and

"dummy" in said office, and she, like Myford Irvine, was under the absolute control and domination of her employer, James Irvine, and had no independent identity or freedom from the control and domination of James Irvine as her employer in the performance of any duties as secretary of the Foundation.

The respondent Foundation makes no effort in its brief to either deny or to attempt to explain any exception to the law that is applicable to the employer-employee and principal and agent relationship between James Irvine, as the employer and principal, and Myford Irvine and E. M. Price, as his employees and agents. It therefore follows that from this admitted relationship of principal and agent, the District Court should have made a finding as a matter of law that the possession of the Indenture and/or the Irvine stock by Myford Irvine or E. M. Price constituted his or her possession thereof as the employees and agents of their employer, James Irvine, and that their possession therefore was, as a matter of law, the possession of their employer and principal, James Irvine. The closing sentence of the above finding by the District Court states that the only possession of the Indenture following its execution, as shown by the evidence, was the possession of the Foundation shortly following the death of James Irvine. Under this finding by the Court, the burden of establishing the actual physical delivery of the Indenture during the lifetime of James Irvine rested on the respondent Foundation, and it failed to do so. The evidence referred to in this finding is that on September 19, 1947, there was a special meeting of the board of directors of The James Irvine Foundation and the minutes of this

meeting, Exhibit A-14, contain a statement that the Indenture was read by Miss Price to the board of directors. On September 19, 1947, E. M. Price, who was employed by James Irvine during his lifetime as his stenographer and secretary, was employed following the death of James Irvine by the executors of the Estate of James Irvine, deceased, as their secretary, as shown by Appendix I, pp. 136 to 139, inclusive, of the Petition. In connection with this finding, the District Court made the further finding that the petitioner had failed to establish the nondelivery of the Indenture and that the evidence preponderates in favor of a finding that the Indenture was, following its execution, delivered to the Foundation by James Irvine and it was thereafter retained by it. This latter finding conflicts with the other finding by the District Court that there was no evidence in the record showing possession of the Indenture following its execution except the evidence of the meeting of the directors of the Foundation shortly following the death of James Irvine when Miss Price read the Indenture to the assembled directors.

It is therefore clear from the only evidence in the case that James Irvine did not, by any act on his part that is disclosed by the record, actually make a physical delivery of the Indenture during his lifetime to any person or entity. Furthermore, the Court was in error in holding that the burden of proving the nondelivery of the Indenture rested with the petitioner. Lawson v. Lowengard, 59 Cal.Rptr. 186; Blonde v. Jenkins, 131 Cal.App.2d 682, 281 P.2d 14.

[2] The next finding of the District Court, which appears at page 90 of the Petition, is to the effect that the petitioner had failed to establish the nondelivery of the certificates of the Irvine stock and this finding is likewise an error of law, as the burden was on the Foundation to show such delivery by the preponderance of the evidence. As heretofore stated, the only evidence in the case concerning the delivery of the Irvine stock consisted of the testimony of N. Loyall McLaren and Robert H. Gerdes. Mr. McLaren was president of the Foundation at the time of the deposition hearing, and both Mr. McLaren and Mr. Gerdes at said time were also directors and trustees of the Foundation. Both of these parties testified that during the lifetime of James Irvine, he had stated to them that he had delivered the Irvine stock to Myford Irvine and E. M. Price. There is no evidence that Mr. Irvine ever told either Mr. McLaren or Mr. Gerdes that he had delivered the Irvine stock to The James Irvine Foundation as trustee. As heretofore pointed out, this evidence did not support a finding of the legal delivery of the Irvine stock or the Indenture to the trustee during the lifetime of James Irvine for the reason that the said Myford Irvine and E. M. Price at the time of said delivery, were the exclusive employees and agents of James Irvine, who held absolute control and dominion over his said employees and agents in their respective simulated offices of president and secretary of the Foundation. No attempt is made by the respondent Foundation in its brief to refute the relationship of employer and employee and master and servant between James Irvine and Myford Irvine and E. M. Price which is connected with the

delivery of the Irvine stock. This finding of the District Court of the delivery of the Irvine stock to the Foundation as trustee, based upon the only evidence in the case that such delivery was made to Myford Irvine and E. M. Price under the circumstances hereinabove set forth, is clearly erroneous.

[3] The next finding made by the District Court involves the interpretation of paragraph 2 of the Indenture, which paragraph permits the trustee to use all or any part of the income of the trust for private purposes through the guise or device of investing such income in a private institution, such as a private school or any other private and noncharitable entity. Appendix Q, pp. 173-175, of the Petition. The applicable law to this noncharitable provision that is contained in the Indenture is set forth in the Petition at pages 33 to 35, inclusive, and the argument of the respondent Foundation in its brief does not change either the application of the authorities cited by the petitioner or the interpretation of this noncharitable provision, which is an inherent and inextricable part of the Indenture and which renders the entire trust void.

The statement in the brief of the respondent Foundation that this investment provision only amounts to a power that is vested in the trustee to accumulate the income from the noncharitable trust corpus, to wit, the Irvine stock, for investment purposes is not true, as said paragraph 2 of the Indenture expressly states that the Foundation as trustee may each year set aside such sum from the income received as the board of directors of the trustee in its sole discretion deems wise and expedient for investment, and said trustee shall each year invest the

same in accordance with subparagraph 3 of the Indenture, which said unrestricted investments, when made, shall become a part of the noncharitable corpus or principal of the trust property. It is therefore apparent that this is not a power which is vested in the trustee to accumulate income for investment purposes, for once the income is so used, the investments become part of the corpus of the trust and lose their identities as charitable income forever. The question involved here is not how the present trustees of the respondent Foundation have administered the trust or whether or not they have devoted any of the trust income to noncharitable uses. The question of law that is involved and which is fatal to the validity of the trust is whether or not the trustees under this noncharitable provision have the power to devote any part of the trust income to a noncharitable or private purpose, and it is immaterial whether or not the present board of trustees has exercised this power. This income trust is in perpetuity, and another board of trustees which succeeds the present board in the future may decide to exercise said power to devote a part or all of the trust income to a noncharitable purpose under the guise of making an investment, and it is this power to do so that renders the entire trust void.

[4] The next finding that was made by the District Court on the merits of the issues involved in the deposition hearing was that the trust was not an agency and that it was not an attempted testamentary disposition by the trustor, James Irvine. This finding by the Court is completely overruled by the documentary evidence introduced by both the petitioner and the respondent Foundation, which was completely disregarded by the District Court.

Neither is any of this documentary evidence referred to by the respondent Foundation in its brief, although a number of the documentary exhibits introduced at the deposition hearing and which constituted the substantial evidence, are set forth in the Appendix to the Petition. This documentary evidence is irrefutable by the respondent Foundation, as practically all of it came from the files of the respondent Foundation or The Irvine Company, which is controlled by the respondent Foundation. The District Court in its Memorandum informally refers to some of this documentary evidence but makes no direct connection therewith in any of its findings. The District Court refers to the income tax returns of The Irvine Company during the period from 1936 to 1947, which covers the lifetime period of James Irvine subsequent to the date of the Indenture, to wit, February 24, 1937. Each of the Federal and State of California Income Tax Returns of The Irvine Company, Exhibit 3, contained a schedule which disclosed that James Irvine was the president of The Irvine Company, that he received a salary of $12,000 per year and that he owned 547 shares of the stock of The Irvine Company. The District Court in its Memorandum stated that this schedule did not mean what it stated, to wit, that James Irvine owned 547 shares of the stock of The Irvine Company, although the income tax returns were signed either by James Irvine, as president of The Irvine Company, or some other officer of said corporation under the penalty of perjury. No mention, however, is made by the District Court of the additional documentary evidence which is set forth in each of the said Federal and State of California Income

Tax Returns during said eleven-year period and which is the endorsement that is typed on the balance sheets that are attached to each of said income tax returns during said eleven-year period, which states:

> "Ownership of Company stock. James Irvine owns 547 shares out of a total of 1,000 shares outstanding. This stock was acquired in 1894 and his return is filed in San Francisco, where he resides."

No attempt is made by the respondent Foundation in its brief to explain or detract from the conclusive significance of this statement of ownership of 547 shares of Irvine stock by James Irvine, which appears on said balance sheets. The 510 shares of Irvine stock that are described in the Indenture are a part of and are included in this 547 shares of Irvine stock, and this documentary evidence certainly established that the finding by the District Court that the Irvine trust was not testamentary is clearly erroneous.

The brief of the respondent Foundation does not attempt to explain the documentary evidence which is set forth in the Petition at pages 153 to 163, inclusive, as Appendix N and which is a verbatim duplication of the stockholders certificate records of The Irvine Company. This documentary evidence established the contention of the petitioner that James Irvine had the physical possession of Certificates Nos. 33 and 42 for 173 shares of Irvine stock on April 21, 1941. The respondent Foundation contended that said certificates had been delivered to Myford Irvine and E. M. Price in 1937. With reference to this contention of the petitioner, the District Court

stated in its Memorandum that the record was silent as to the facts and circumstances that surrounded the possession of these two certificates of Irvine stock by James Irvine on April 21, 1941. However, the superior documentary evidence established through the stockholders certificate records of The Irvine Company that, contrary to the finding of the District Court, these two certificates were actually in the physical possession of James Irvine on April 21, 1941 and were surrendered by him to The Irvine Company on the same date, to wit April 21, 1941, and seven new certificates of Irvine Company stock under different certificate numbers and in different denominations were issued to James Irvine and in his name and signed by him as the president of The Irvine Company, as shown by the check marks which have been made before and after the name "James Irvine" in Appendix N at pages 156, 158, 159 and 161 of the Petition. This documentary evidence from the records of The Irvine Company demonstrates that the finding of the District Court to the contrary is clearly erroneous.

II

In connection with the findings of the District Court which held that the trust was not testamentary and was not a mere agency as contended by the petitioner, the District Court further stated as follows:

> "The contention of the Plaintiff as to the matter of agency is closely connected with the matter of testamentary disposition. If during his lifetime the relationship of James Irvine and the Foundation as to the shares was that of principal and agent,

that relationship would, of course, have been terminated by his death. If the relationship was that of agency, then no valid trust was established as to the shares and James Irvine continued to be the owner of them for testamentary purposes; and the disposition by him under the Indenture of Trust would have been testamentary in character."

The foregoing statement of the law of agency that is applicable to the substantial documentary evidence introduced by the petitioner in this case is correct, but the District Court did not follow its statement of the law of agency and the attempted testamentary disposition by James Irvine of the Irvine stock to the uncontradicted evidence in the case, which clearly established that Myford Irvine and E. M. Price, who are the only persons involved to whom the delivery of the Irvine stock or the Indenture was made, were the employees and agents of the trustor, James Irvine, and therefore the principle of the law of agency applied to this relationship and the District Court should have applied the law as stated by the District Court to the undisputed evidence in the case and rendered judgment against the respondent Foundation and in favor of the petitioner, who was the plaintiff in the District Court.

III

As hereinabove mentioned, there was no formal trial of the case in the District Court. The proceeding conducted before the District Court from May 1 to May 17, 1967 was a deposition hearing under the judicial supervision of Honorable Henry N. Graven, Retired Senior Judge from the Northern District of Iowa. Because there

was no formal trial in the case at any time, the rules of evidence which would control a trial were not invoked. At the conclusion of the deposition hearing, the case was submitted to Judge Graven on the depositions, and the sixteen volumes of the reporter's transcript on file herein constituted the depositions of the respective witnesses who were examined by counsel for the parties.

The foregoing situation is brought to the attention of this Court for the reason that the same discloses the informality in which the record in this case was made.

When the case reached the United States Court of Appeals for the Ninth Circuit upon the Notice of Appeal filed by the petitioner, as the appellant, the Honorable Richard H. Chambers, Chief Judge of the United States Court of Appeals for the Ninth Circuit, disqualified all of the members of said Court from hearing the appeal, the same as he had previously disqualified all of the District Court judges in the Ninth Circuit from hearing the case in the District Court. The apparent basis for this disqualification order by Chief Judge Chambers was the fact that Chief Judge Thurmond Clarke of the United States District Court for the Central District of California is the stepfather of the petitioner. This disqualification order, although unprecedented in any other case that is known to counsel for the petitioner, resulted in the assignment of three senior retired judges from outside the Ninth Circuit and from three separate Circuit Courts of Appeals to hear the petitioner's appeal. On August 27, 1968, these three judges came to San Francisco, California, and heard the arguments of counsel for the respective parties

in said appeal and subsequently issued their decision, which affirmed the judgment of the District Court. As aforesaid, these three judges were from three separate and distinct Circuit Courts of Appeals as follows: Hon. John C. Pickett, Retired Senior Judge from the Tenth Circuit Court of Appeals; Hon. Austin L. Staley, Retired Senior Judge from the Third Circuit Court of Appeals; and Hon. Warren L. Jones, Retired Senior Judge from the Fifth Circuit Court of Appeals.

It is the contention of the petitioner, Athalie Irvine Smith, that these three Court of Appeals judges, coming from three different circuits, did not constitute either a Constitutional or a statutory Court of Appeals. Rule 35, Rules of Appellate Procedure, provides that a majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the Court of Appeals in banc and that a party may suggest the appropriateness of a hearing or a rehearing in banc. In the event such a request for a hearing or a rehearing is made by a party, Rule 35 further provides that the clerk shall transmit any suggestion to the judges of the court who are in regular active service, but a vote will not be taken to determine whether the cause should be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

Petitioner therefore contends that in view of the order of Chief Judge Chambers which disqualified every active member of the Court of Appeals for the Ninth Circuit

from entertaining an appropriate motion for an order that the appeal of petitioner, Athalie Irvine Smith, should be heard or reheard by the active judges of the Court of Appeals for the Ninth Circuit in banc, constituted a denial of petitioner's Constitutional right to procedural due process and also of her Constitutional right to have her day in court and to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner was also precluded by reason of said disqualification order of Chief Judge Chambers of the Ninth Circuit Court of Appeals from exercising her right to make a motion in some other Court of Appeals in another circuit than the Ninth Circuit, that her appeal be heard or reheard in banc by any other Court of Appeals among the ten Circuit Courts of Appeals that make up the appellate judiciary system of the federal courts, for the reason that each of the three judges on the panel that heard and decided her appeal were from three different circuits and not one of the Courts of Appeals in the Tenth, Third or Fifth Circuits had any jurisdiction to entertain a hearing of said appeal or a rehearing thereof in banc, and petitioner was therefore denied her Constitutional right to procedural due process and her Constitutional right to have her day in court and to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

On April 7, 1969, petitioner's counsel wrote a letter to Messrs. McCutchen, Black, Verleger & Shea, attorneys of record for the respondent Foundation, and sent a copy

thereof to each of the counsel of record for the other respondents in the case and to John F. Davis, Esq., Clerk, Supreme Court of the United States. In this letter counsel for the respondents were advised that this additional matter concerning a denial to the petitioner of due process of law and procedural due process would be presented to the Supreme Court in the petitioner's Reply Brief to the brief or briefs of the respondents.

IV

James Myford Irvine is both a lineal descendent, issue and an heir of his grandfather, James Irvine, and also a beneficiary under the last Will and Testament of his grandfather. The California authorities cited by the petitioner at pages 116 to 118, inclusive, of her petition correctly set forth the California law that is applicable to the status of James Myford Irvine as a descendant, issue and heir of his grandfather. None of these authorities are challenged in the brief of the respondent Foundation, and particularly Section 250 of the California Probate Code, which provides that James Myford Irvine is substituted in the place of his father, who died in 1959, to the right to inherit from his grandfather, together with his sister, Linda Irvine Gaede, the same share or right in the estate of his grandfather that his father, Myford Irvine, would have taken as an heir if living. Appendix E, pp. 116-118, of the Petition. There can be no difference concerning the rights of James Myford Irvine to inherit from his grandfather than the rights of his sister, Linda Irvine Gaede. The statement at page 14 of respondent's brief that the respondent Linda Irvine Gaede was not joined

in the action on the Motion of the Foundation as an heir at law of James Irvine but solely as a beneficiary of the residue of her grandfather's estate under the terms of his Will is contradicted by the record that was made by the respondent Foundation in the District Court. The respondent Foundation made a Motion to join Linda Irvine Gaede as an indispensable party to the petitioner's action, and in support of said Motion an Affidavit was filed by Howard J. Privett, as counsel for the Foundation, and in said affidavit the affiant, Howard J. Privett, unequivocally stated: "That the records, pleadings and files herein disclose that Linda Irvine Gaede is an heir at law of James Irvine, deceased, and a beneficiary of the Estate of James Irvine, Deceased." Appendix A, infra p. 8. The facts concerning the relationship of Linda Irvine Gaede as related in the Affidavit of the Foundation's counsel, Howard J. Privett, under oath, and based upon the further factual statement that said relationship as an heir appeared from the records, pleadings and files in the action, cannot at this late date be countermanded by the unsworn and incorrect statement that appears on page 14 of the respondent Foundation's brief to the contrary. Furthermore, the facts in the case as disclosed by the record are indisputable, and under these facts and the law in California, both Linda Irvine Gaede and her brother, James Myford Irvine, are entitled to share the interest that their father, Myford Irvine, would receive, if living, in the event the Irvine inter vivos trust is held to be void.

James Myford Irvine also, like his sister, Linda Irvine Gaede, is named as a beneficiary under the Will of his grandfather, James Irvine. This Will was introduced in

evidence by the respondent Foundation as Exhibit B. Under Article Fifth, Paragraph A, of said Will, James Irvine made provision for his widow. During the probate of the Will and in the year 1950 before the Estate of James Irvine had been distributed, the widow died. Her interest in the Will was thereupon distributed under Paragraph A of Article Fifth to Kate Lillard Wheeler and Linda Jane Irvine by adding to the trust estates of said granddaughters one-half of the trust estate provided for the widow. Paragraph B of Article Fifth of the Will provides that three-eights of the residuary estate is devised in trust for Kate Lillard Wheeler and further provides that in the event that Kate Lillard Wheeler dies leaving no issue, her estate shall be distributed to Athalie Anita Irvine, the petitioner herein, and to Linda Jane Irvine; and that if either Athalie Anita Irvine or Linda Jane Irvine die without issue before Kate Lillard Wheeler dies leaving no issue, the shares of Athalie Anita Irvine and Linda Jane Irvine shall be paid over, absolutely, to Myford Irvine, as the son of the testator, James Irvine, or in the event of the death of Myford Irvine, then to his issue, by right of representation.

The foregoing provision, which relates to James Myford Irvine as issue of Myford Irvine, is repeated in Paragraphs C and D of Article Fifth of the Will. Paragraph C is for the benefit of the petitioner and Paragraph D is for the benefit of Linda Irvine Gaede.

It is therefore apparent from the Will of James Irvine that James Myford Irvine is a testamentary beneficiary under Paragraphs B, C and D of Article Fifth of said Will.

James Myford Irvine is also a testamentary beneficiary of the Will of James Irvine under Article Fifth, Paragraph F, which provides in subparagraph 2 as follows: "If any of my residuary estate remains in the hands of my trustees after making distribution of my estate in accordance with the provisions of this Will, such remaining estate shall be paid over, in equal shares, to my then surviving issue, by right of representation." In view of the foregoing provisions which are set forth in the Last Will and Testament of James Irvine, it is futile for the respondent Foundation to represent to this Court that the said minor grandson of the decedent, James Irvine, is not a named testamentary beneficiary in the Last Will and Testament of his grandfather. Linda Irvine Gaede and James Myford Irvine, who stand in the identical relationship as heirs, descendants and issue and testamentary beneficiaries of their grandfather, James Irvine, are both indispensable parties to the action, and the failure to join the minor, James Myford Irvine, as an indispensable party to this action and to foreclose his Constitutional rights to have his day in court and due process of law as such indispensable party, cannot be either logically or legally supported by the respondent Foundation.

The respondent Foundation contends that James Irvine did not die intestate by reason of the residuary clause that is contained in his Will. The petitioner contends, however, that the residuary clause of said Will, as set forth in subparagraph 2 of Paragraph F, Article Fifth, constitutes the residuary estate of said Will in the event that petitioner prevails in her action to have the inter vivos trust declared void. The Estate of James Irvine was distributed by the

executors thereof to the testamentary trustees in 1952, and if judgment is entered for the petitioner and the 459 shares of Irvine stock become an asset of the estate of James Irvine, then James Myford Irvine, as one of the surviving issue of his grandfather, James Irvine, is entitled to his share of said 459 shares of Irvine stock.

The issue raised by the complaint of the petitioner to the effect that James Irvine died intestate as to the 510 shares of Irvine stock (now 459 shares) was never litigated in the District Court, and no finding on this issue was made by the District Court. It was the contention of the petitioner in her Petition for Rehearing filed with the Court of Appeals and denied by said Court, that the substantial evidence introduced at the deposition hearing disclosed that James Irvine died intestate as to the 510 shares of the Irvine stock and therefore that the petitioner and the other heirs at law of James Irvine would be entitled to the distribution of the Irvine stock as such heirs and that the same would not come under the trust provisions of the Will of James Irvine, deceased. However, none of these issues were considered by the District Court, and as above stated, no finding thereon was made by the District Court. This issue therefore is still open. The record in this case clearly discloses that in the event the inter vivos trust is held to be void, the 510 shares (now 459 shares) of Irvine stock would not come under the trust provisions of the Will of James Irvine, deceased.

V

The entire corporation officer staff of the Foundation trustee consisted of the full time office employees and

agents of James Irvine, during the ten-year period that represented the life of James Irvine subsequent to the date of the Indenture, to wit, February 24, 1937. They were Myford Irvine, his office clerk and his "dummy" president; Paul A. Dinsmore, another office clerk as his "dummy" vice president; and E. M. Price, his "faithful" stenographer and secretary, as his "dummy" secretary and treasurer. Each of these employees and agents were on the personal payroll of James Irvine for any duties that were rendered by them during said ten-year period, including the services, if any, that they performed for him as his "dummy" officers of the Foundation trustee. They received no compensation from the Foundation trustee. Appendix I, pp. 136-139, inclusive, of the Petition. Exhibits A-76 and A-77.

Under these circumstances the possession of either the Indenture or the Irvine stock during said ten-year period by Myford Irvine or E. M. Price, as the undisputed employees and agents of James Irvine, and no one else, and regardless of their "dummy" titles, as president and secretary-treasurer of the Foundation trustee, would be the possession of their employer and principal, James Irvine, as a matter of law. *Monell v. College of Physicians and Surgeons,* 198 Cal. App. 2d 38, 17 Cal. Rptr. 744; pp. 123-125 of the Petition. *Lawson v. Lowengart,* 251 ACA 98, 59 Cal. Rptr 184; pp. 125-129 of the Petition.

Trustors of charitable trusts, such as James Irvine, are recipients from the United States Government of extraordinary special tax exemption privileges and immunities which are not enjoyed by the ordinary taxpayer citizen. By reason of this grant of special privilege, the recipient

who thereby avoids the payment of estate taxes on his charitable trust is required to create and execute the trust in strict compliance with the law, the same as a testator who must execute his Will in accordance with strict legal formalities. The Estate of James Irvine, Deceased, avoided the payment of estate taxes to the United States Government in the sum of more than $3,000,000 by reason of the alleged charitable trust of James Irvine, which involved 510 shares of the stock of The Irvine Company.

The first basic legal requirement that is connected with the creation of a valid inter vivos trust is stated in the case of Edwards v. Guaranty Trust, etc. Bank, 47 Cal.App. 86, 89, 190 P. 57, 59, as follows:

> "To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual constructive or symbolical delivery, without power of revocation. 20 SYC 1193. In order to accomplish this, 'there must be a parting by the donor with all present and future legal power and dominion over the property.' "

Whether the delivery is actual or symbolic, there is no valid gift of personal property unless the donor becomes divested of all control. As said in Estate of Alberts, 38 Cal.App.2d 42, 47, 100 P.2d 538:

> "Complete divestment of all control by the donor is a necessary essential to constitute a valid gift of personal property. [13 Cal. Jur. 32, Sec. 1.] This is true regardless of whether the delivery of the property is actual or symbolic."

Under the above-stated mandate of the law involving the essential requirements to constitute the legal delivery of the trust property, there must be complete relinquishment from any present or future control by the trustor thereover.

Because of the relationship of master and servant and principal and agent between James Irvine, as master and principal, and Myford Irvine and E. M. Price, as servants and agents, James Irvine had the legal power to revoke the delivery at any time and to recall the Indenture and the Irvine stock from his servants and agents, Myford Irvine and E. M. Price. Under these circumstances James Irvine, as a matter of law, never parted "with all present and future legal power and dominion over the property", to wit, the Indenture and the Irvine stock.

The principal of law that the delivery of the trust property must be irrevocable is not to be confused with the reservation by the trustor in the trust instrument of a power to revoke the trust after there has been a legal delivery of the trust property. Unless there has been a legal delivery, there is no existing valid trust and it is of no matter or relevancy what the provisions of the trust instrument might be.

Neither of the decisions of the courts below discloses the true evidentiary facts that establish the relationship of master and servant and principal and agent that existed between James Irvine, as the master and principal, and Myford Irvine and E. M. Price, as his servants and agents, that was connected with the delivery of the Indenture and the Irvine stock. These decisions of the courts below are

therefore shockingly wrong and are not supported by the record or the evidence in this case, and they should not be permitted to stand as approved guidelines for future trustors who seek special tax exemption privileges and immunities.

VI

In addition to the reasons stated by the petitioner in her Petition with reference to the importance of the issues involved in the case which support the granting by the Supreme Court of a Writ of Certiorari, the petitioner respectfully submits that, not only for said reasons, but also because there not only is great public interest at stake in this case but further the decisions of the Courts below represent a gross miscarriage of justice, and the result reached by the Courts below is unduly harsh in its impact. Furthermore, the manner in which the appeal of the petitioner was conducted in the Court of Appeals is not only unprecedented but also constituted a denial to the petitioner of due process of law and her right to have her day in court as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as a denial of procedural due process, and therefore it is proper that this Honorable Court correct the plain error which appears in the record in this case by granting the Petition for a Writ of Certiorari.

Respectfully submitted,

LYNDOL L. YOUNG
Counsel for Petitioner

April, 1969

APPENDIX A

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

ATHALIE IRVINE SMITH, *Plaintiff,* *vs.* THE JAMES IRVINE FOUNDATION, a corporation, et al., *Defendants.*	No. 66-1285-JWC Application for Order Joining Parties Defendant (F.R.C.P. Rules 19, 21), Memorandum of Points and Authorities, and Affidavit of Howard J. Privett in Support thereof

Defendant, The James Irvine Foundation, and the individual defendants herein, hereby make application for an order joining as parties defendant in this action Linda Irvine Gaede; Gloria Wood Irvine and Security First National Bank, a national banking corporation, as executors and trustees of the Estate of Myford Irvine, deceased; William Thornton White, Jr., as executor of the Estate of Katharine Brown Irvine, deceased; and the Attorney General of the State of California, and each of them.

This application is made upon the ground that each said proposed party defendant is a proper and necessary or indispensable party to this action and that the joinder of said parties is required to fully and finally resolve the pending controversy and to avoid subjecting those who are already parties herein to a substantial risk of a multiplicity of actions possibly involving inconsistent results.

The proposed new parties, and each of them, can be joined herein as defendants without depriving this court of jurisdiction and each proposed new party is subject to the jurisdiction of this court as to both service of process and venue.

This application is based upon this notice, the affidavit of Howard J. Privett and the memorandum of points and authorities annexed hereto and the records, pleadings and files in this action.

Dated: March 27, 1967.

McCUTCHEN, BLACK, VERLEGER & SHEA
BURNHAM ENERSEN
HOWARD J. PRIVETT
SHELDON A. GEBB

By HOWARD J. PRIVETT
HOWARD J. PRIVETT

Attorneys for Defendants The James Irvine Foundation, et al.

PILLSBURY, MADISON & SUTRO
CHARLES B. RENFREW

By CHARLES B. RENFREW
CHARLES B. RENFREW

Attorneys for Kate L. Wheeler

MEMORANDUM OF POINTS AND AUTHORITIES

The plaintiff has failed to name or join as parties defendant in this action heirs at law of James Irvine, deceased, beneficiaries of the estate of James Irvine, deceased, and the Attorney General of the State of California, each of whose interests are adverse to those of plaintiff and will be affected by any judgment entered herein. The proposed parties defendant are citizens of the State of California, are subject to the jurisdiction of this court and can be made parties defendant herein without depriving the court of jurisdiction. Accordingly, their joinder should be ordered under the provisions of Rule 19 of the Federal Rules of Civil Procedure which provides in relevant part:

> "(a) PERSONS TO BE JOINED IF FEASIBLE.
>
> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he

be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

Where, as here, the plaintiff has failed to join parties who should be before the court in order to fully and finally resolve the pending controversy, the court should order their joinder on its own initiative or on motion of the defendants. Rule 21 of the Federal Rules of Civil Procedure; *Hoffman v. Santly-Joy,* 51 F.Supp. 778 (S.D.N.Y. 1943); Moore's Federal Practice, 2nd Ed. Vol. 3, § 21.05.

The plaintiff brings this action as an heir at law of James Irvine, deceased, and as a beneficiary, devisee and legatee under the will of James Irvine, deceased. Plaintiff's position in the action is in direct conflict with the interests of the other persons who are heirs at law and/or beneficiaries of the estate of James Irvine, deceased. A judgment herein would necessarily affect the rights of said persons and if they are not joined as parties, the persons who are already parties would be subject to a substantial risk of multiplicity of actions involving the same subject matter with possibly inconsistent results. It is therefore necessary and proper that said parties be joined herein as parties defendant. *Bank of California v. Superior Court,* 16 Cal.2d 516, 106 P.2d 879 (1940). The same rule applies in the Federal Courts. *Baird v. Peoples Bank and Trust Co. of Westfield,* 120 F.2d 1001

(3rd Cir. 1941); *Warner v. First National Bank of Minneapolis,* 236 F.2d 853 (8th Cir. 1956), *cert. denied* 352 U.S. 927 (1956).

The Attorney General of the State of California under the provisions of the Uniform Supervision of Trustees for Charitable Purposes Act (California Government Code, sections 12580-12595) is responsible for the regulation and supervision of the charitable trust established by the Indenture of Trust between James Irvine, as trustor, and The James Irvine Foundation, as trustee, dated February 24, 1937. Since the plaintiff seeks in this action to terminate said charitable trust, the Attorney General is an indispensable party to the action. Government Code section 12591 expressly so provides:

> "The Attorney General may institute appropriate proceedings to secure compliance with this article and to invoke the jurisdiction of the court. The powers and duties of the Attorney General provided in this article are in addition to his existing powers and duties. Nothing in this article shall impair or restrict the jurisdiction of any court with respect to any of the matters covered by it, except that *no court shall have jurisdiction to modify or terminate any trust of property for charitable purposes unless the Attorney General is a party to the proceedings.*" (Emphasis added.)

Plaintiff is on record as having no objection to the joinder of the proposed parties defendant who are necessary and indispensable parties to this action, and has acknowledged that their joinder may be ordered without

the necessity of a hearing as appears in the following extract from the Reply of Plaintiff to Answer of All Defendants to Amended Complaint Except the Irvine Company:

> "The plaintiff has heretofore indicated to the court the plaintiff has no objection to the joining in this action of any parties whose interests are involved in said action and may be affected by any judgment entered herein and who appear to the court to be necessary or indispensable parties to this action as provided in Rules 19 and 21 of the Federal Rules of Civil Procedure whenever the court shall determine of its own motion that said parties, whoever they may be, shall be so joined." (Page 16, lines 11-18.)

Under the provisions of Rule 21 of the Federal Rules of Civil Procedure, no formal notice need be given to the proposed new parties of the application for their joinder. *United States v. Bayer Co.*, 105 F.Supp. 955 (S.D.N.Y. 1952). However, as appears from the affidavit of Howard J. Privett, annexed hereto, each of the proposed parties defendant has been furnished with copies of the complaint, amended complaint, answers to the amended complaint and other pleadings on file herein and each has been advised of the making of this application through their respective counsel.

This application is presented ex parte with notice to the other parties to this action for the reason that it is imperative that the proposed new parties be brought into the action before the next scheduled hearings which begin on May 1, 1967. Under the terms of the Order Ruling

on Motions and Order Giving Directions as to Further Proceedings in the case filed herein on February 23, 1967, the parties are permitted to proceed with the taking of depositions by the usual procedure from and after March 20, 1967. The attorneys for the parties have conferred on the matter of a schedule for the taking of the depositions which are not to be taken under judicial supervision and it has been agreed that the depositions will commence on or about April 4, 1967. With the consent of counsel for the plaintiff, the proposed parties defendant have been invited to attend said depositions but an order should be entered herein joining them as parties defendant so that they may participate in said depositions if they be so advised.

DATED: March 27, 1967.

Respectfully submitted,

McCUTCHEN, BLACK, VERLEGER & SHEA
BURNHAM ENERSEN
HOWARD J. PRIVETT
SHELDON A. GEBB

By HOWARD J. PRIVETT
HOWARD J. PRIVETT

Attorneys for Defendants The James Irvine Foundation, et al.

PILLSBURY, MADISON & SUTRO
CHARLES B. RENFREW

By CHARLES B. RENFREW
CHARLES B. RENFREW

Attorneys for Defendant Kate L. Wheeler

AFFIDAVIT OF HOWARD J. PRIVETT

STATE OF CALIFORNIA
} ss.
COUNTY OF LOS ANGELES

HOWARD J. PRIVETT, being first duly sworn, deposes and says:

1. That he is an attorney at law and a member of the firm of McCutchen, Black, Verleger & Shea, and is one of the attorneys for the defendants herein.

2. That the records, pleadings and files herein disclose that Linda Irvine Gaede is an heir at law of James Irvine, deceased, and a beneficiary of the Estate of James Irvine, deceased. Said Linda Irvine Gaede resides at 4541 Brighton Road in the City of Corona Del Mar, County of Orange, State of California, and is represented by the law firm of Latham & Watkins and John P. McLoughlin, Esq., 615 South Flower Street, Los Angeles, California, with respect to the matters involved in this action.

3. The records, pleadings and files herein disclose that Myford Irvine, deceased, was an heir at law of James Irvine, deceased, and a beneficiary of the estate of James Irvine, deceased. Gloria Wood Irvine, the widow of said Myford Irvine, deceased, and the Security Pacific National Bank, a national banking corporation, are the executors and trustees of the estate of Myford Irvine. Gloria Wood Irvine resides at 5 Harbor Island, in the City of Newport Beach, County of Orange, State of California. The Security Pacific National Bank conducts business at 561 South Spring Street, in the City and County of Los

Angeles, State of California. Said executors and trustees are represented with respect to the matters involved in this action by the law firm of Lillick, McHose, Wheat, Adams & Charles and John C. McHose, Esq., 600 South Spring Street, Los Angeles, California.

4. The records, pleadings and files herein disclose that Katharine Brown Irvine, deceased, was an heir at law of James Irvine, deceased, and a beneficiary of the estate of James Irvine, deceased. William Thornton White, Jr., who is a resident of Orinda, California, is the executor of the estate of Katharine Brown Irvine. He is represented by Elden C. Friel, Esq., 1006 Russ Building, San Francisco, California, with respect to the matters involved in this action.

5. Defendant The James Irvine Foundation as trustee of the charitable trust which is the subject of this action is subject to the regulation and supervision of the Attorney General of the State of California with respect to the administration of said trust under the provisions of the Uniform Supervision of Trustees for Charitable Purposes Act (California Government Code, section 12580-12595). The Attorney General has an office at 600 State Building, 217 West First Street, Los Angeles, California.

6. The persons above named, and each of them, have been advised through their respective counsel by affiant that defendants will move this Court for an order requiring their joinder herein as parties defendant and said persons through their said counsel have been furnished with copies of the complaint, amended complaint, answers to the amended complaint and other pleadings in this action.

7. The persons above named, and each of them, through their respective counsel have been advised of and invited to attend the depositions now scheduled to begin herein or or about April 4, 1967, and affiant has been orally advised by plaintiff's counsel, Lyndol L. Young, that plaintiff has no objection to their attendance at said depositions.

HOWARD J. PRIVETT
HOWARD J. PRIVETT

Subscribed and sworn to before me
this 27th day of March, 1967.

BARBARA REED
Notary Public in and for said
County and State

My Commission Expires April 6, 1968